



TOWN COUNCIL STAFF REPORT

Meeting date: August 17, 2023

APPLICATION NO:	REZ-2023-02
SUBJECT:	Change of Zoning
LOCATION:	6199 S ST RD 13; 0 S SR 13
PROPERTY OWNER(S):	Carolyn L Wilson & Wilson Land Trust c/o Dick Wilson
PETITIONER(S):	LKQ Midwest Inc. (Randy Smith) and FMC Advisors LLC (Chris Farrar)
SUMMARY:	Rezoning of the real estate from Agricultural to General Industrial zoning district.
WAIVERS REQUESTED:	None
RECOMMENDATION:	Plan Commission recommendation: NEUTRAL (see Certificate) Staff recommendation: APPROVAL (findings of fact in this report)
PREPARED BY	Oksana Polhuy, Planning Administrator
EXHIBITS	Exhibit 1. Location and Use Map Exhibit 2. Aerial Map Exhibit 3. Submittal Exhibit 4. Site Plan Exhibit 5. Site and Neighborhood Pictures Exhibit 6. Comprehensive Plan, Recommended Land Use Map Exhibit 7. Parks Plan. Sand Creek Nature Park Map Exhibit A. Remonstrance Emails Exhibit B. Wellhead Protection Area Exhibit C. A copy of the file that was given by a member of the public during July 13 th hearing. Exhibit D. A copy of the file that was given by a member of the public during July 13 th hearing.. Exhibit E. LKQ responses to the files in Exhibits C and D. Exhibit F. Pictures of the recently built LKQ facility in Watkins, Colorado

PROCEDURE

The application was filed on June 8, 2023 for a public hearing at the July 13, 2023 Plan Commission meeting. Prior to the public hearing before the Commission, a published legal notice was advertised on June 22nd and public hearing notices were mailed to the surrounding property owners on June 28th. Plan Commission continued the hearing to investigate health effects of permitting the proposal at the site and held a 2nd public hearing on August 10th, 2023.

The Plan Commission heard the evidence presented by Staff, petitioner/owner, and any and all individuals in the audience wishing to speak for or against the proposed project or to just ask questions. The Plan Commission held a discussion among themselves and made a *neutral* recommendation to the Town Council.

The Council has 90 (ninety) days to hear the proposal, including the Plan Commission's recommendation at the Council meeting(s). At the final Council meeting, the proposal as presented in an Ordinance format is either adopted or denied. If the Town Council fails to act on the proposal within 90 (ninety) days, the proposal is defeated.

STANDARDS FOR AMENDMENTS

Per Lapel UDO, V1.8.6, in reviewing the rezoning petition, the Plan Commission and Town Council shall pay reasonable regard to the following:

1. Whether the proposed amendment is consistent with the goals, objectives, and policies of the Comprehensive Plan;
2. Whether the proposed amendment is compatible with current conditions and the overall character of uses in the immediate vicinity of the subject property;
3. Whether the proposed amendment is the most desirable use for which the land in the subject property is adapted;
4. Whether the proposed amendment will have an adverse effect on the value of properties throughout the jurisdiction; and
5. Whether the proposed amendment reflects responsible standards for development and growth.

CORRESPONDENCE

This report includes Remonstrance Letters in Exhibit A.

ABOUT PROJECT

Location

The subject site is located on the west side of SR 13, about 975 feet south of the intersection of SR 38 and SR 13. The 102-acre subject site is comprised of three parcels, all in the same ownership, currently zoned Agricultural and used for farming (see Exhibits 1, 2, and 5).

Proposal

The petitioners, LKQ Midwest Inc., would like to rezone this property to General Industrial to use it for a vehicle recycling facility (see Exhibit 3. Submittal). The petitioner would like to conduct recycling operations inside of a newly built facility and store the vehicle shells outdoors. These uses are not permitted in the Agricultural zoning district. Due to that, the petitioner is requesting to rezone the property to General Industrial where the uses described above would be permitted or permitted as a Special Use.

Exhibit 4, the *concept* site plan, shows the following planned improvements:

- a building with offices and indoor facilities for dismantling vehicles (≈133,400 sf);
- a parking lot to serve the office;
- a storage yard around the building and on the rest of the lot;
- a fence to screen the storage yard around the entire perimeter of the yard;
- a planned landscape buffer outside of the fence;
- a drainage detention pond;
- a floodplain around the Sand (or Mud) Creek that the construction won't encroach into.

The preliminary exhibits of the building and some examples of it being constructed in Colorado and Arizona are in Exhibit 3 in the "Presentation" section.

ANALYSIS

Compatibility with Surrounding Area

The subject site is zoned "Agricultural" and is "vacant land" or "agricultural" per tax use records. It contains an old building that would be demolished. The surrounding zoning and uses are displayed in Exhibit 1 and in Exhibit 5. The site is surrounded by the following uses:

- North: vacant or agricultural use; Zoning: Agricultural.
- East: vacant or agricultural use; Zoning: Agricultural and General Industrial.
- South: vacant, agricultural, industrial, and residential uses; Zoning: Agricultural and General Industrial.
- West: vacant or agricultural use; Zoning: Agricultural.

The proposed zoning district either matches some of the adjacent properties zoned General Industrial, or will have minimal impact on the vacant or agricultural properties around.

Consistency with Lapel Comprehensive Plan

Consistency with the community vision, land use goals, objectives and policies. In the recent survey conducted for the Comprehensive Plan 2021, the community supported growth and diversification of commercial and industrial activities south of State Road 38, which is where the site is located.

Consistency with the Proposed Land Uses in CP

The Lapel Comprehensive Plan's Proposed Land Use Map (see Exhibit 6) designates the property for light industrial use, which matches the character of some of the uses requested by the applicant as well as the architectural character of the proposed building. Though the requested General Industrial zoning district is not shown on the map of recommended uses *at all*, the recommended Light Industrial is the closest recommended use to the General Industrial zoning district.

Character of uses permitted in the General Industrial district per Lapel's UDO

"The "Ig", General Industrial District is intended to provide locations for general industrial manufacturing, production, assembly, warehousing, research & development facilities, and similar land uses. This district is intended to accommodate a variety of industrial uses in locations and under conditions that minimize land use conflicts. This district should be used to support industrial retention and expansion in Lapel."

Character of uses permitted in the Light Industrial district per Lapel's UDO

"The "Il", Light Industrial District is intended to provide locations for light production, assembly, warehousing, research & development facilities, and similar land uses. This district is intended to accommodate only industrial uses that are completely contained within structures and do not involve the outdoor storage of materials or the release of potential environmental pollutants. This district should be used to support industrial retention and expansion in Lapel."

Analysis of the Impact on Surrounding Uses. Given that the majority of the land around the subject site are vacant lands or used for agricultural and industrial purposes, an addition of the industrial use will not be creating a negative impact on the surrounding uses. Some of the features like a fence around the entire perimeter of the storage yard and landscape buffers would also create a visual buffer between the project and the surrounding uses. The only conflicting surrounding use is a residential use located to the southwest of the project site. However, since there is a floodplain on the west side of the project site, it will create a 300-450-ft-wide buffer between the residential and the proposed industrial uses.

Consistency with Lapel Parks and Recreation Master Plan

One of the seven major goals listed in this plan is to create policy to “*preserve floodplain areas as open space and, where possible, to maintain them as park areas with trails*”. The Sand Creek Nature Park and Greenway is the proposed long-term project to create this area (Exhibit 7). The west portion of the project is within this area. The applicant is aware of it and is willing to work with the town to rezone that floodplain area on the lot into the Parks and Open Space zoning district in the future.

Industrial Uses and Water Quality

During the public hearing, several concerns were brought up about the potential threats to the ground water quality if this project was allowed at this site. Groundwater is located everywhere. The most common possible sources of groundwater pollution are already present in Lapel (septic tank effluent, agriculture, etc.). The question is not so much about where to locate salvage yards in relation to aquifers, but rather how to protect water anywhere from any development. How to ensure that the development won't harm it: what kinds of regulations are already in place to protect the environment?

About the aquifer's bedrock under the subject site. Here is a [map of aquifers](#) in Madison County. The note about the aquifer's bedrock located under the proposed project site states the following, *"This subsystem is generally not very susceptible to surface contamination because intertill sand and gravel units are overlain by thick till deposits. Wells producing from shallow aquifers are moderately to highly susceptible to contamination."*

Wellhead Protection Area and the subject site. The Wellhead Protection Area in the map provided during the hearing and attached here as Exhibit B. It shows the area needing extra protection because it's for the well that provides water for a Community Public Water System.

"Ground water constantly moves through the earth toward wells. Wellhead protection is intended to prevent contamination which occurs on the land surface from reaching the ground water (well water) below by protecting the land surface above. This is done by setting up a zone around the well called a Wellhead Protection Area (WHPA). Within this area, any buildup, spill, or leak of materials that could contaminate the ground water (aquifer) is a concern. A management and education plan for the area lessens exposure to potential contaminants."

The subject site **isn't** in this protected area and is located about 0.4-0.5 miles south of it.

State Regulations and Potentially Contaminating Uses. In Indiana, IDEM oversees whether the environmental regulations are adhered to. If a spill occurs, then IDEM investigates it. There are a number of permits that the industrial sites may be required to apply for as well.

The state of Indiana would require LKQ to apply for a salvage yard license and *possibly* for a stormwater permit. Other IDEM permits for industrial uses exist like water quality certification

permit, construction in the floodway (which LKQ is NOT planning on doing) and Industrial Wastewater Permit (only needed if the facility is planning to discharge liquids into the wastewater system). However, when I contacted IDEM with the scope of LKQ's activities, they mentioned only the license and the possibility of the construction/stormwater permit.

STAFF RECOMMENDATION

Staff recommends APPROVAL of application REZ-2023-02 because:

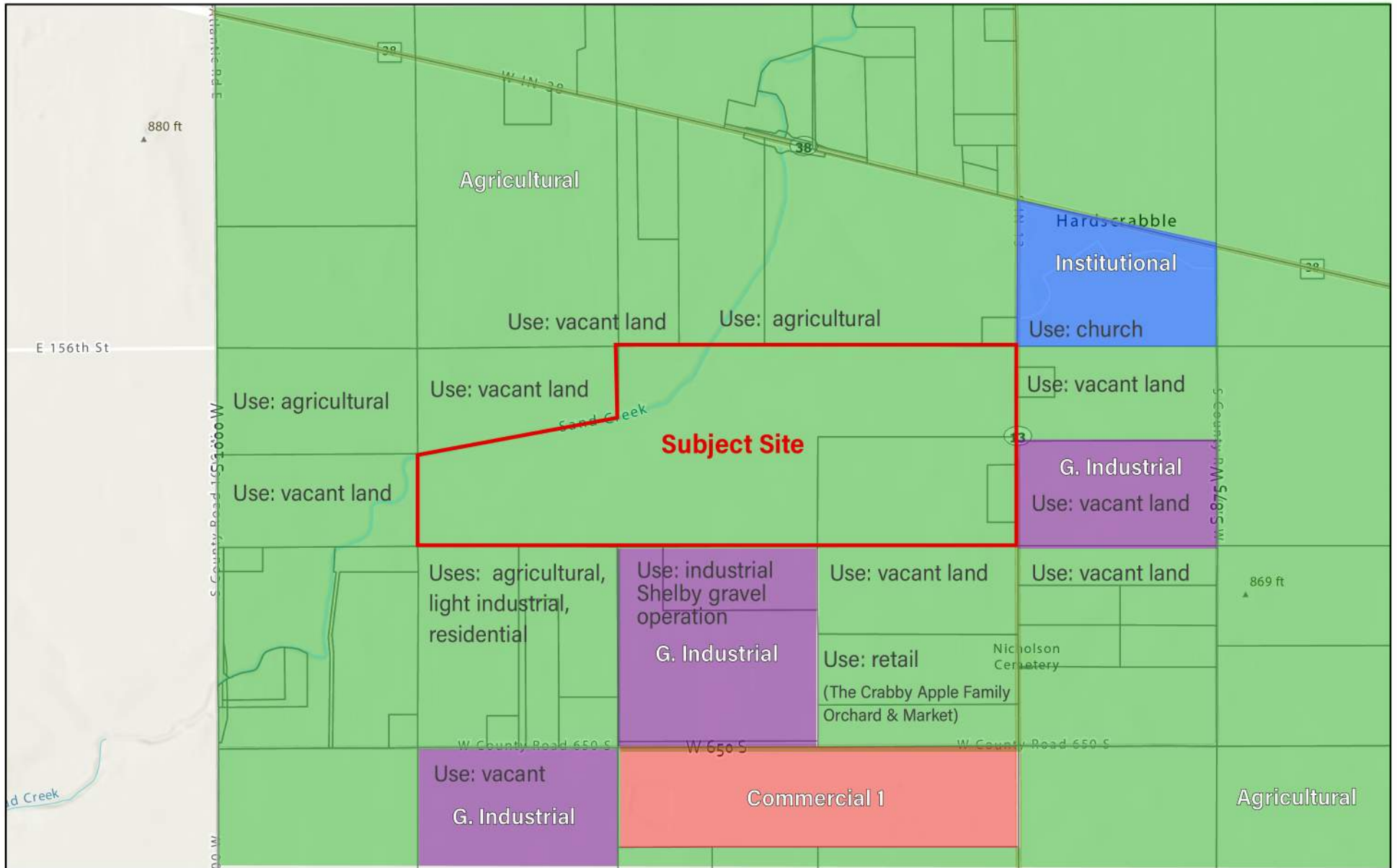
1. The proposed zoning district is consistent with the policies of the Comprehensive Plan because the area is recommended for an industrial use;
2. The proposed use and zoning district is compatible with the surrounding uses in the immediate vicinity;
3. The subject site is located in a place that is logical for a General Industrial zoning district to be within the planning jurisdiction of Lapel due to its proximity to the highway and state roads;
4. Keeping industrial uses close to the state roads and highways is the typical location for industrial zoning districts, and keeping this area far away from the residential core of the town preserves the property values throughout the jurisdiction; and
5. The proposed location of the zoning district would use the state road infrastructure and some utility infrastructure governed by non-Lapel utilities, which decreases the need to use Lapel's public resources.

MOTION OPTIONS (Change of Zoning Request)

1. Motion to *approve* the Change of Zoning from Agricultural to General Industrial Zoning District for the subject real estate as per submitted application REZ-2023-02 because ... **(List reasons, findings of fact).**
2. Motion *deny* the Change of Zoning from Agricultural to General Industrial Zoning District for the subject real estate as per submitted application REZ-2023-02 because... **(List reasons, findings of fact)**
3. Motion to *continue* the review of the application REZ-2023-02 until the next regular meeting on September 21, 2023.

Next Plan Commission meeting date(s): September 21st, 2023.

EXHIBIT 1. LOCATION, ZONING & LAND USE MAP



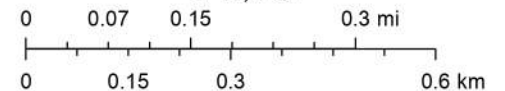
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Madison County Parcels 6-Local

Road_Labels_Symbology

3-State Road

1:14,445

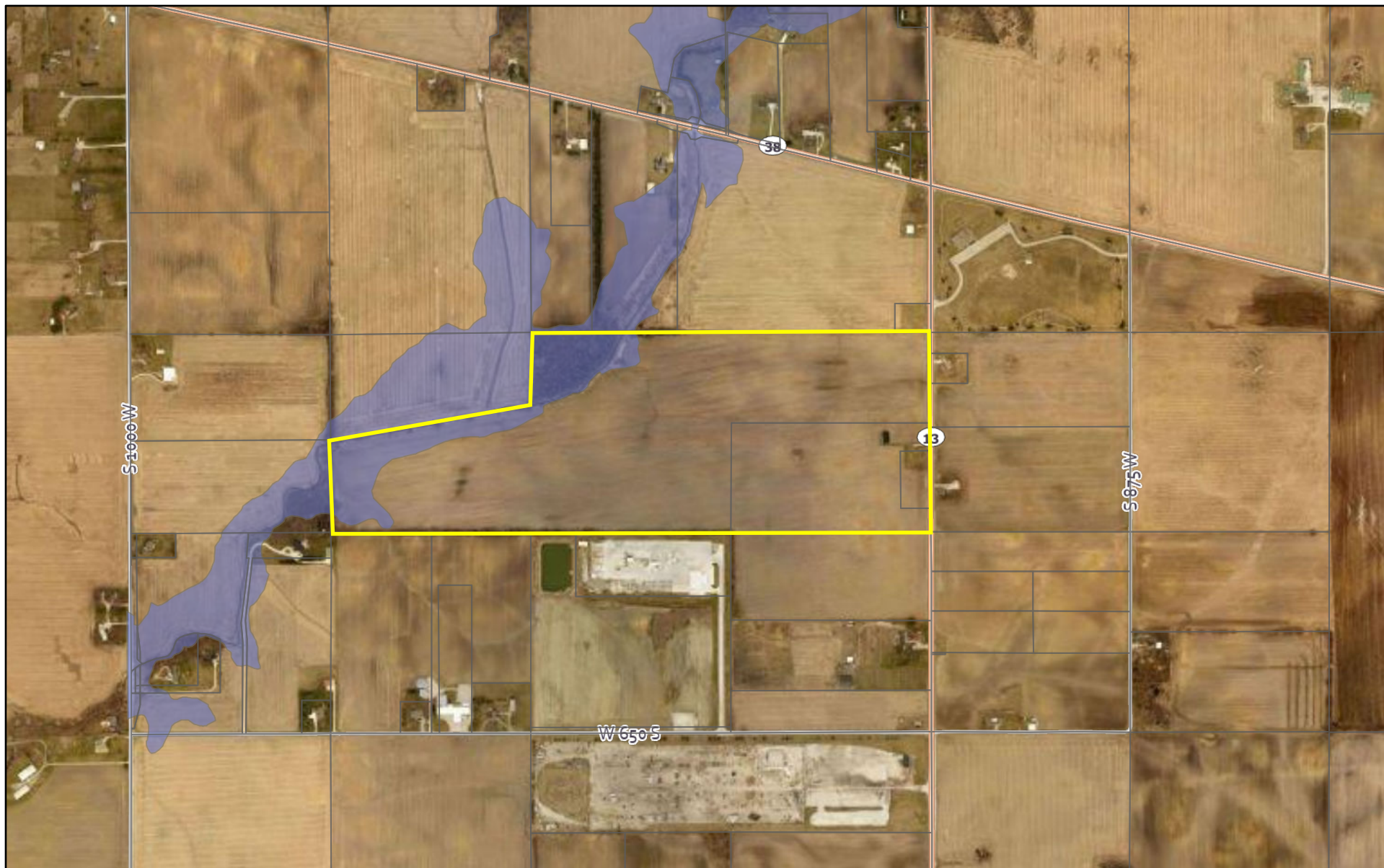


Esri, NASA, NGA, USGS, FEMA, Esri Community Maps Contributors, MCOG, Esri, HERE, Garmin, SafeGraph, GeoTechnologies, Inc, METI/

MCCOG

Esri, NASA, NGA, USGS, FEMA | Esri Community Maps Contributors, MCOG, © OpenStreetMap, Microsoft, Esri, HERE, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA | MCOG |

EXHIBIT 2. AERIAL MAP



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Madison County Parcels

X Min

6-Local

FEMA Floodplain

Road_Labels_Symbology

AE

3-State Road

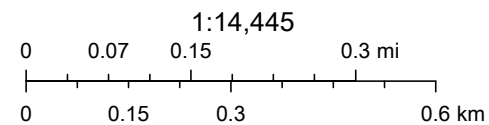




EXHIBIT 3. SUBMITTAL REZONE/PUD PETITION CHECKLIST

NOTE: All documents must be legible. All text documents must be typewritten, or computer generated. All drawings, such as site plans, elevations, sign details, maps, surveys, must be drawn to an appropriate scale, dimensioned, and in ink.

1. **Checklist.** One (1) completed checklist (this form).
2. **Application.** One (1) completed petition, signed by the owner of the subject property or an authorized agent, notarized, and filed according to the adopted Filing Calendar.
3. **Location Map.** One (1) copy of a general location or area map indicating (in a reproducible manner) the location of the property and the surrounding area. Maps created using internet mapping sites are acceptable.
4. **Legal Description.** Four (4) copies of the legal description attached to the petition. Attach one to the petition; attach one copy to each of the Ordinances as referenced above.
Metes and bounds descriptions should include two (2) copies of the perimeter survey, drawn to scale.
- or -Recorded subdivision legal description includes lot number, section number, subdivision name, plat book number with page number and must include a plat map (plat maps are available in Room 741 of the City-County Building/or a nominal charge).
5. **Site Plan.** Three (3) copies of a site plan must be filed. Plans must be legible and drawn to a scale of 1= 10, 1=20, 1=30, or 1=40. Additional information may be required, but at the minimum, plans must include the information described on the site plan.
6. **Non-refundable filing fee.** See Fee Schedule for fee.
7. **On-site hearing notice sign fee.** The On-Site Notice must be posted in a conspicuous location along each street frontage of the affected property. There is a non-refundable fee of \$10 per sign required.
8. **Surrounding property owners address list.** The petitioner must obtain a list of surrounding property owners from the Madison County Assessor's Office **not** earlier than 30 days before the public hearing.
9. **Contact person. NOTE:** The Contact Person, listed in the application will be contacted regarding all applications steps, including being contacted by the newspaper publisher for Legal Notice payment.

Acceptable methods of payment include cash, check, or MasterCard, VISA, Discover or American Express credit card. Checks must be made payable to "Town of Lapel." Credit cards are accepted; however, the credit card processing agency assesses a fee ~3% of the transaction amount.



PLAN COMMISSION

DOCKET NO.

PETITION APPLICATION

PETITIONER REQUEST CIRCLE ONE THAT APPLIES	<input checked="" type="radio"/> Rezone - <input type="radio"/> PUD - <input type="radio"/> Ordinance/PUD Amendment - <input type="radio"/> Modification to commitments		
MEETING DATE REQUEST	July 13, 2023		
PROPERTY OWNER	Carolyn L Wilson & Wilson Land Trust c/o Dick Wilson		
OWNER'S ADDRESS	3154 MYRTLE DR LAPEL, IN 46051/P.O. Box 5950 SUN CITY CENTER, FL 33571		
PROJECT ADDRESS	0 SR 13 LAPEL, IN 46051	TOWNSHIP	Green Township
OWNER'S EMAIL ADDRESS	dickwilson@c21be.com	PHONE NUMBER	(813) 326-5900
PETITIONER	LKQ Midwest Inc./Randy Smith & Chris Farrar/Woodside Cptal Advisors		
PETITIONER'S ADDRESS	500 West Madison Street Suite 2800 Chicago, IL 60661		
PETITIONER'S EMAIL ADDRESS	rrsmith@lkqcorp.com/chris@woodside-capital.cr	PHONE NUMBER	(602) 692-6420
LEGAL DESCRIPTION (SELECT ONE)	COMPLETE METE AND BOUNDS LEGAL DESCRIPTION ATTACHED -OR- PLATTED SITE WITHIN A RECORDED SUBDIVIION, COPY OF PLAT MAP ATTACHED. SUBDIVION NAME <u>Legal Description Attached</u> LOT NUMBER(S) _____ SECTION NUMBER(S) _____ RECORDED IN PLAT BOOK NUMBER _____ PAGE(S) _____ OR RECORDED AS INSTRUMENT NUMBER _____		
OWNERSHIP	DOES THE PETITIONER OWN 100% OF THE AREA INVOLVED IN THE PETITION? YES <input checked="" type="radio"/> NO OTHER OWNERS?		
TAX PARCEL NUMBERS	Parcel # 48-15-16-100-001.000-044 Parcel # 48-15-16-500-001.000-044 Parcel # 48-15-16-100-003.000-044		



ACREAGE	102 Acres	PARCEL COUNT	3
CODE ENFORCEMENT	IS THE PROPERTY SUBJECT TO ANY CODE ENFORCEMENT ACTION? YES NO		
CURRENT ZONING CLASSIFICATION	Vacant Land; Other Agricultural Use		
CURRENT COMPREHENSIVE PLAN RECOMMENDATION	Industrial - Distribution Warehouse & Logistics		
EXISTING PROPERTY USE	Farming		
EXISTING IMPROVEMENTS ON PROPERTY	2700 SF Metal Barn		
PROPOSAL NARRATIVE	ATTACH NARRATIVE IF NEEDED See Attached		
ORDINANCE	SPECIFY ANY SPECIFIC ORDINANCE(S), STANDARD(S), CONDITION(S), COMMITMENT(S), AND/OR REGULATION(S) SOUGHT TO BE MODIFIED. ATTACH ADDITION PAGE IF NEEDED. See Attached Narrative Detailing Special Use Request for Outside Storage		

OATH: THE PETITION APPLICATION INFORMATION, TO MY KNOWLEDGE AND BELIEF, IS TRUE AND CORRECT.

[Signature]
 PETITIONER SIGNATURE

OWNER SIGNATURE

NOTARY
 SUBSCRIBED AND SWORN
 TO BEFORE ME THIS
 NOTARY PUBLIC
 SIGNATURE
 NOTARY PUBLIC PRINTED
 NAME
 MY COMMISSION EXPIRES

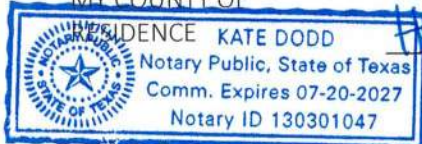
DATE 6/7/23
Kate Dodd
Kate Dodd
7/20/27

MY COUNTY OF HARRIS

NOTARY
 SUBSCRIBED AND SWORN
 TO BEFORE ME THIS
 NOTARY PUBLIC
 SIGNATURE
 NOTARY PUBLIC PRINTED
 NAME
 MY COMMISSION EXPIRES

DATE
See Attached
Owner Affidavit

MY COUNTY OF
 RESIDENCE



TOWN OF LAPEL
825 Main St, Lapel, IN 46051
Planning@lapelindiana.org

OWNER AFFIDAVIT FORM

STATE OF Indiana
COUNTY OF Madison S.S.

The undersigned, having been duly sworn on oath, states that they are the Owner of the Property involved in this application and that they hereby acknowledge and consent to the forgoing Application.

Owner printed name**: CAROLYN L Wilson

Owner signature**: Carolyn L Wilson

Before me the undersigned, a Notary Public in and for said County and State, personally appeared the Property Owner, who having been duly sworn acknowledged and consents to the execution of the foregoing Application.
Subscribed and sworn to before me this 24th day of May, 2023.

Notary printed name: Courtney Courtney

Notary signature: Courtney Courtney



Courtney Courtney, Notary Public
Madison County, State of Indiana
Commission No: NP0735746
My Commission Expires 08/24/2029

My commission expires: 08/24/2029

**** A signature from each party having interest in the property involved in this application is required. If the Property Owner's signature cannot be obtained on the application, then a notarized statement by each Property Owner acknowledging and consenting to the filing of this application is required with the application.**

TOWN OF LAPEL
825 Main St, Lapel, IN 46051
Planning@lapelindiana.org

OWNER AFFIDAVIT FORM

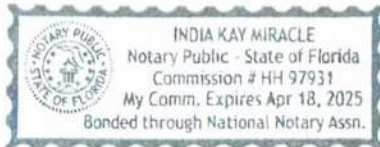
STATE OF Florida
COUNTY OF Hillsborough S.S.

The undersigned, having been duly sworn on oath, states that they are the Owner of the Property involved in this application and that they hereby acknowledge and consent to the forgoing Application.

Owner printed name**: RICHARD S WILSON

Owner signature**: Richard Wilson, Trustee

Before me the undersigned, a Notary Public in and for said County and State, personally appeared the Property Owner, who having been duly sworn acknowledged and consents to the execution of the foregoing Application. Subscribed and sworn to before me this 25 day of May, 2023.



Notary printed name: INDIA KAY MIRACLE

Notary signature: India Kay Miracle

My commission expires: 4/18/2025

*** A signature from each party having interest in the property involved in this application is required. If the Property Owner's signature cannot be obtained on the application, then a notarized statement by each Property Owner acknowledging and consenting to the filing of this application is required with the application.*



FINDINGS OF FACT for Rezoning and Planned Unit Developments

Rezoning/PUD Criteria: The Indiana Code and the Lapel Zoning Ordinance establish specific criteria to which both the Plan Commission and Town Council must pay reasonable regard to when considering a rezoning request. Those criteria are listed below. Explain how this request addresses each criterion (answers may be labeled and attached as additional pages):

1. **The Comprehensive Plan:** This proposed change of zoning supports the comprehensive plan because

See Attached Narrative

Find Lapel's Comprehensive Plan at <https://lapelindiana.org/news.asp?id=237>

2. **Characteristics & Current Conditions:** This proposed change of zoning supports the current conditions and the character of current structures and uses in each district because

See Attached Narrative

3. **Desired Use:** This proposed change of zoning supports the most desirable use for which the land in each district is adapted because

See Attached Narrative

4. **Property Values:** This proposed change of zoning supports the conservation of property values throughout the jurisdiction because

See Attached Narrative

5. **Growth Management:** This proposed change of zoning supports responsible development and growth because

See Attached Narrative

Fill out additional criteria for PUD applications on the next page.

Additional criteria from Lapel Zoning Ordinance, V12.2.3 Preliminary Plan & Rezoning (for a Preliminary Plan, Planned Unit Development Request):

- **Requirements and Intent** - This proposed change of zoning to Planned Unit Development fulfills the requirements and intent of this Article (The Zoning Ordinance) and the Subdivision Control Ordinance because

N/A

- **Overlay Requirements** - This proposed change of zoning to Planned Unit Development is Consistent with the requirements of all applicable overlay districts because

N/A



Commitment No. NCS-1176301-CHI2

EXHIBIT A

The Land referred to herein below is situated in the County of **Madison**, State of **Indiana**, and is described as follows:

BEGINNING AT A POINT ON THE EAST LINE OF THE NORTHEAST QUARTER OF SECTION 16, TOWNSHIP 18 NORTH, RANGE 6 EAST, SAID POINT BEING 746 FEET NORTH OF THE SOUTHEAST CORNER OF SAID NORTHEAST QUARTER, AND RUNNING THENCE WESTERLY 1,335.1 FEET ON AND ALONG A PROPERTY LINE FENCE TO A POINT ON THE WEST LINE OF THE EAST HALF OF SAID NORTHEAST QUARTER, SAID POINT BEING 746.5 FEET NORTH OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER OF SAID NORTHEAST QUARTER, THENCE NORTHERLY 1,306.35 FEET ON AND ALONG SAID WEST LINE, THENCE EASTERLY 1,334.1 FEET TO A POINT ON SAID EAST LINE OF THE NORTHEAST QUARTER, SAID POINT BEING 607 FEET SOUTH OF THE NORTHEAST CORNER OF SAID SECTION 16, THENCE SOUTH 1,305.10 FEET TO THE PLACE OF BEGINNING. CONTAINING IN ALL 40 ACRES, MORE OR LESS;

EXCEPT:

A PARCEL OF GROUND BEING A PART OF THE NORTHEAST QUARTER OF SECTION 16, TOWNSHIP 18 NORTH, RANGE 6 EAST OF THE SECOND PRINCIPAL MERIDIAN, TOWN OF LAPEL, GREEN TOWNSHIP, MADISON COUNTY, INDIANA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID NORTHEAST QUARTER; THENCE NORTH 00 DEGREES 00 MINUTES 59 SECONDS WEST ALONG THE EAST LINE OF SAID NORTHEAST QUARTER, A DISTANCE OF 746.00 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING NORTH 00 DEGREES 00 MINUTES 59 SECONDS WEST ALONG SAID EAST LINE OF SAID NORTHEAST QUARTER, A DISTANCE OF 583.09 FEET TO THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER OF SAID NORTHEAST QUARTER; THENCE SOUTH 89 DEGREES 58 MINUTES 46 SECONDS WEST ALONG THE NORTH LINE OF SAID SOUTHEAST QUARTER OF SAID NORTHEAST QUARTER, A DISTANCE OF 1333.58 FEET TO THE NORTHWEST CORNER OF SAID SOUTHEAST QUARTER OF SAID NORTHEAST QUARTER; THENCE SOUTH 00 DEGREES 00 MINUTES 24 SECONDS WEST ALONG THE WEST LINE OF SAID SOUTHEAST QUARTER OF SAID NORTHEAST QUARTER, A DISTANCE OF 583.54 FEET; THENCE NORTH 89 DEGREES 57 MINUTES 38 SECONDS EAST, A DISTANCE OF 1333.82 FEET TO THE POINT OF BEGINNING. CONTAINS 17.860 ACRES, MORE OR LESS.

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Lapel Wilson Property Overview

<https://www.google.com/maps/place/40%C2%B000'55.5%22N+85%C2%B050'36.4%22W/@40.015428,-85.843449,855m/data=!3m1!1e3!4m4!3m3!8m2!3d40.015428!4d-85.843449>



LKQ Distribution Facility

Lapel, IN

LKQ

Keeping you moving

LKQ's Global Presence

- LKQ is a global distributor of vehicle products, including replacement parts, components and systems used in repair and maintenance of vehicles and specialty products and accessories
- Founded in 1998 through a combination of wholesale recycled products businesses, which subsequently expanded through organic growth
- 290 acquisitions of aftermarket, recycled, refurbished and remanufactured product suppliers
- Organized into four reportable segments: Wholesale - North America, Europe, Specialty and Self Service
- 1,500 facilities, including roughly 460 in the U.S. and 1,010 in over 25 other countries with 45,000 employees (18,000 in North America)

Our Mission

- To be the leading global value-added sustainable distributor of vehicle parts and accessories by offering our customers the most comprehensive, available and cost-effective selection of part solutions while building strong partnerships with our employees and the communities in which we operate.



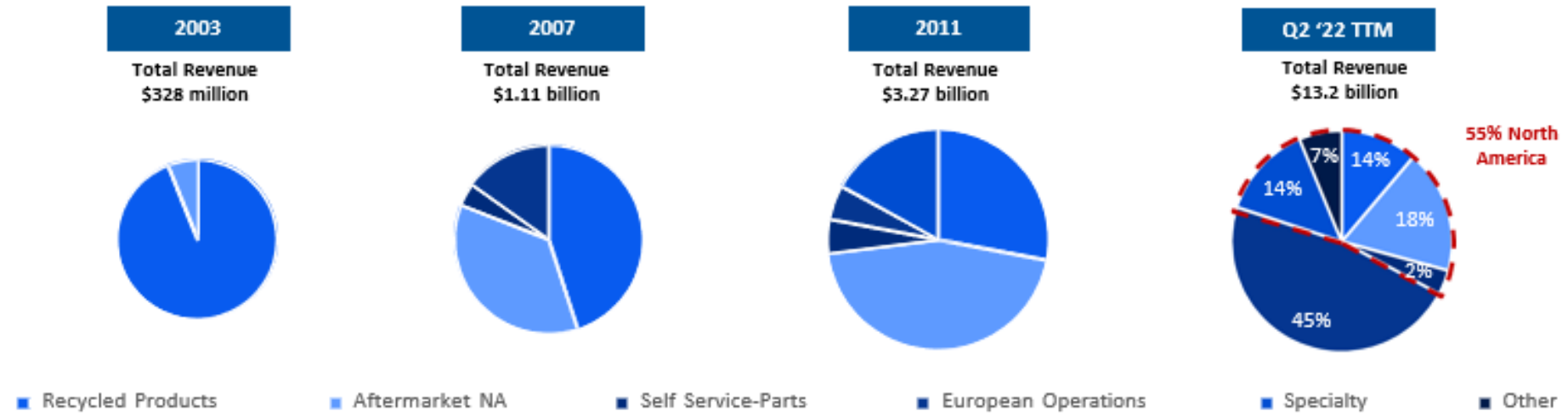
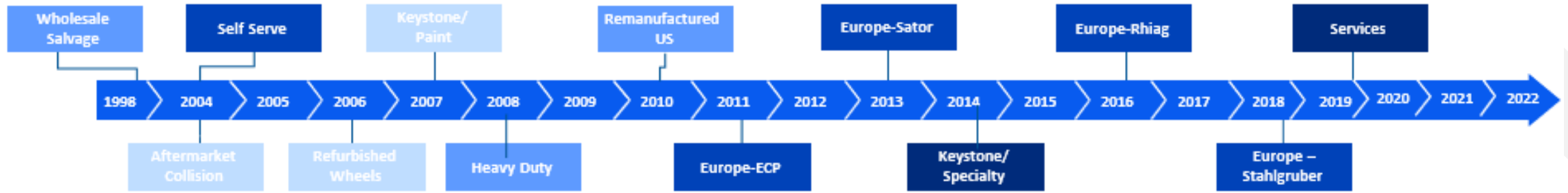
• Like

• Kind

• Quality



LKQ's Evolution Process



LKQ has grown from a North American collision operation to a globally diversified aftermarket distributor

Operating Units Overview

Product Overview

Wholesale - North America

- Collision
 - Aftermarket automotive products
 - Recycled & Refurbished
- Mechanical
 - Recycled engines & transmissions
 - Remanufactured engines & transmissions



Product Overview

Specialty

- Performance products
- Appearance & accessories
- RV, trailer & other
- Specialty wheels & tires
- Marine



Europe

- Mechanical
 - 175,000+ small part SKUs
 - Brakes, filters, hoses, belts, etc.
- Collision
 - Aftermarket (UK) & Recycled (Sweden)

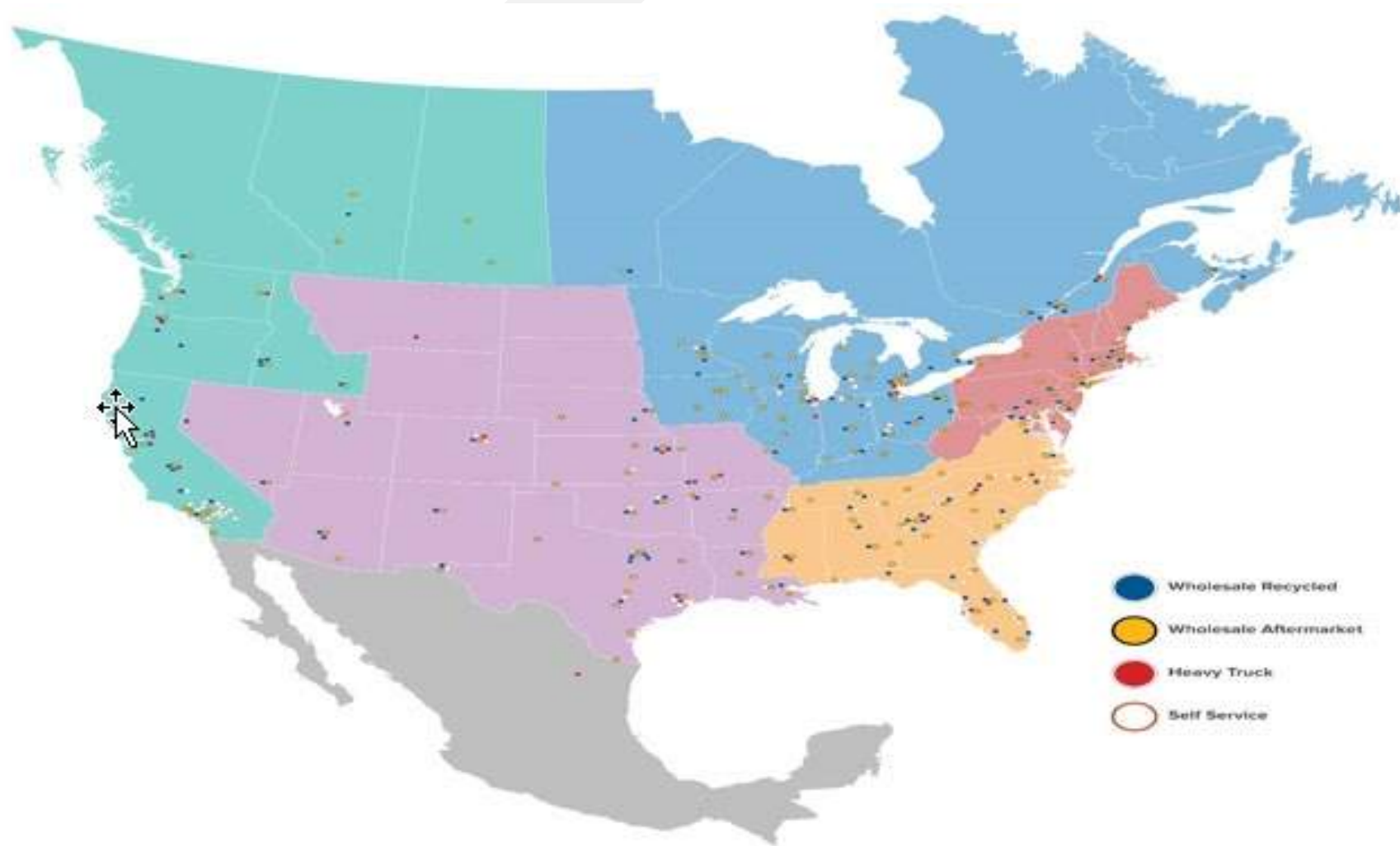


Self Service

- Largest buyer of used vehicles
 - More than 550,000 recycled car and truck parts



Wholesale North America Footprint



Vehicles Dismantled Per Year

- LKQ dismantles or processes over 800,000 vehicles a year through its full service and self serve operations.



Expanding Global ESG Programs

Our core business enables a circular economy

Our 2021 North America Recycling Achievements

783,000	1,462,000	1,107,000	13,794,000	740,000
Number of vehicles procured	Catalytic converters	Tons of Crush Auto/Scrap	Total number of individual parts sold	Batteries

Established new sustainability goals to advance success

Goals in progress to cut carbon emissions 30% by 2030

- Reduce emissions intensity relative to revenue and reduce logistics fleet emissions

Motivating and retaining our winning workforce

- Established 2025 and 2030 goals to increase employee engagement and scores

Governance framework for aligning priorities

Launched LKQ Cares ESG Advisory Committee

- Cross-function team focused on aligning priorities across business units and geographies

Linked Executive Compensation with ESG goals

- Added ESG metrics to incentive compensation plans for certain senior executives

ESG Focus Areas



**Carbon Footprint
& Recycling**



**Employee
Engagement**



**Talent
Development**



**Diversity, Equity
& Inclusion**



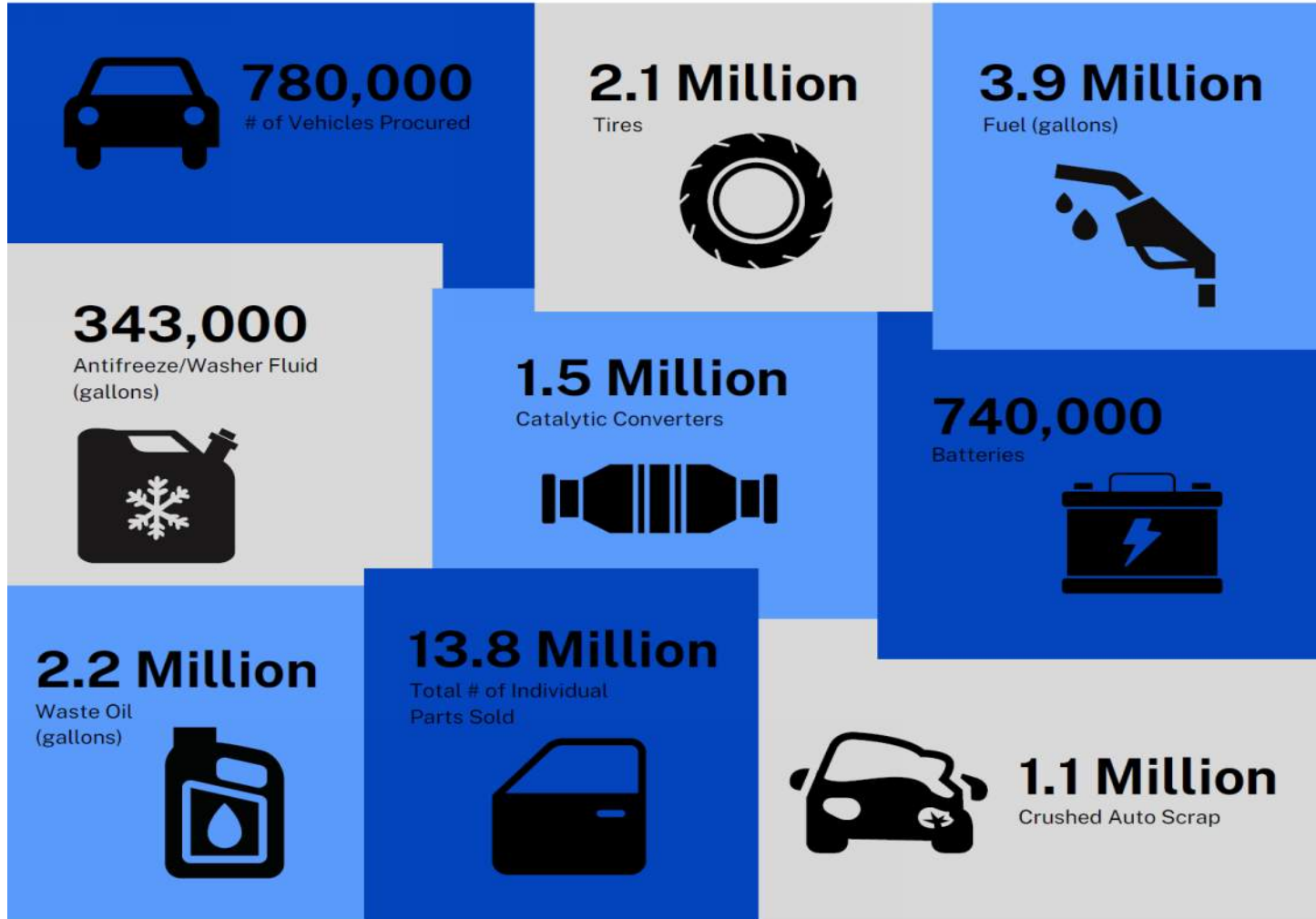
**Sustainable
Supply Chain**



**Community
Support**

Environmental Impact

BY THE NUMBERS: LKQ's 2021 RECYCLING ACHIEVEMENTS



EPA Monitoring at LKQ Facilities

- Standard Storm Water Testing
- Independent Environmental Audits
- Annual Employee Compliance Training at All Locations
- No Smoke, Smell or Excess Noise from Distribution Facilities



LKQ Recycling Achievements

Material	2019	2020	2021
Fuel (gallons)	4.2M	3.9M	3.9M
Tires	2.6M	2.3M	2.1M
Batteries	630,000	658,000	740,000
Waste Oil (gallons)	2.6M	2.3M	2.2M
Aluminum (millions of lbs)	119.9	99.1	97.9
Copper (millions of lbs)	7.9	7.1	6.9
Steel (millions of lbs)	148.6	128.6	123.3

- LKQ's sustainability efforts help decrease the need of metal manufacturers
- As a result, green house gases are significantly reduced and energy is conserved

LKQ Corporate Citizenship

- **Our mission is to build strong partnerships in the communities in which we operate**
 - Local Fire Department Training
 - Recycled Rides
 - LKQ Joseph M. Holsten Scholarship
 - Feeding America (National Foodbank Program across the US)



LKQ Employment in Indiana

City	# of Employees
Plainfield	49
Avon	33
Ft. Wayne	15
Michigan City	13
South Bend	12
Evansville	17
LaPorte	4

- LKQ Lapel will create potentially 70+ jobs after Year 1 of operations
- Average wages are between \$25 - \$40 per hour; 2-3 salaried employees earning near \$90,000. Main employee shift from 7 am – 6 pm.
- Employees receive full benefits and 401k retirement plans

Traffic Impact Analysis (LKQ vs. Industrial Park)

- Lapel Location – 103 acres

	LKQ Facility (133,400 SF)		1,400,000 SF Industrial Park
Type	Trips Per Day (Mon – Fri)	Type	Trips Per Day (Mon - Fri)
Facility Employees (Non-Truck)	70	Facility Employees (Non-Truck)	300
Delivery Box Trucks	25	Delivery Trucks/Vans	80
Tractor Trailers	5	Tractor Trailers (Trailers Stored on Site)	40 (85)
Delivery Service (USPS/FedEx/Amazon)	4	Delivery Service (USPS/FedEx)	40

LKQ On-Site Operations

- **NO PUBLIC ACCESS OR WALK UP CUSTOMERS**
- Nothing stored above 4 feet outside the building
- 8 foot solid panel fence around entire property perimeter
- Extensive landscape buffer and screening
- No smell or excess noise



New LKQ Facility in Denver CO (Completed in 2022)

New LKQ Facility in Salt Lake UT Market (Completed in 2019)



New LKQ Facility in Phoenix AZ Market (Completed in 2018)



Screening



Warehousing



Lapel Distribution Facility

- 133,400 SF Tilt Wall Building
- 103 Acre Site
- \$35M - \$40M Estimated Project Cost
- 60-70 New Jobs Created



SEAL:
NOT FOR CONSTRUCTION

SUBMITTALS / REVISIONS:

NO.	DATE	DESCRIPTION
1	2023.06.07	SCHEMATIC SET

PROJECT NO.: 19-1700
 DRAWN BY: DFW

SHEET TITLE:
A ARCHITECTURAL SITE PLAN

These plan drawings are the property of the registered Designer / Engineer and may not be copied, reproduced or used without their written permission.

SHEET NO.:

A100

 **1** PRESENTATION SITE PLAN
 A100 SCALE: 1" = 160'-0"

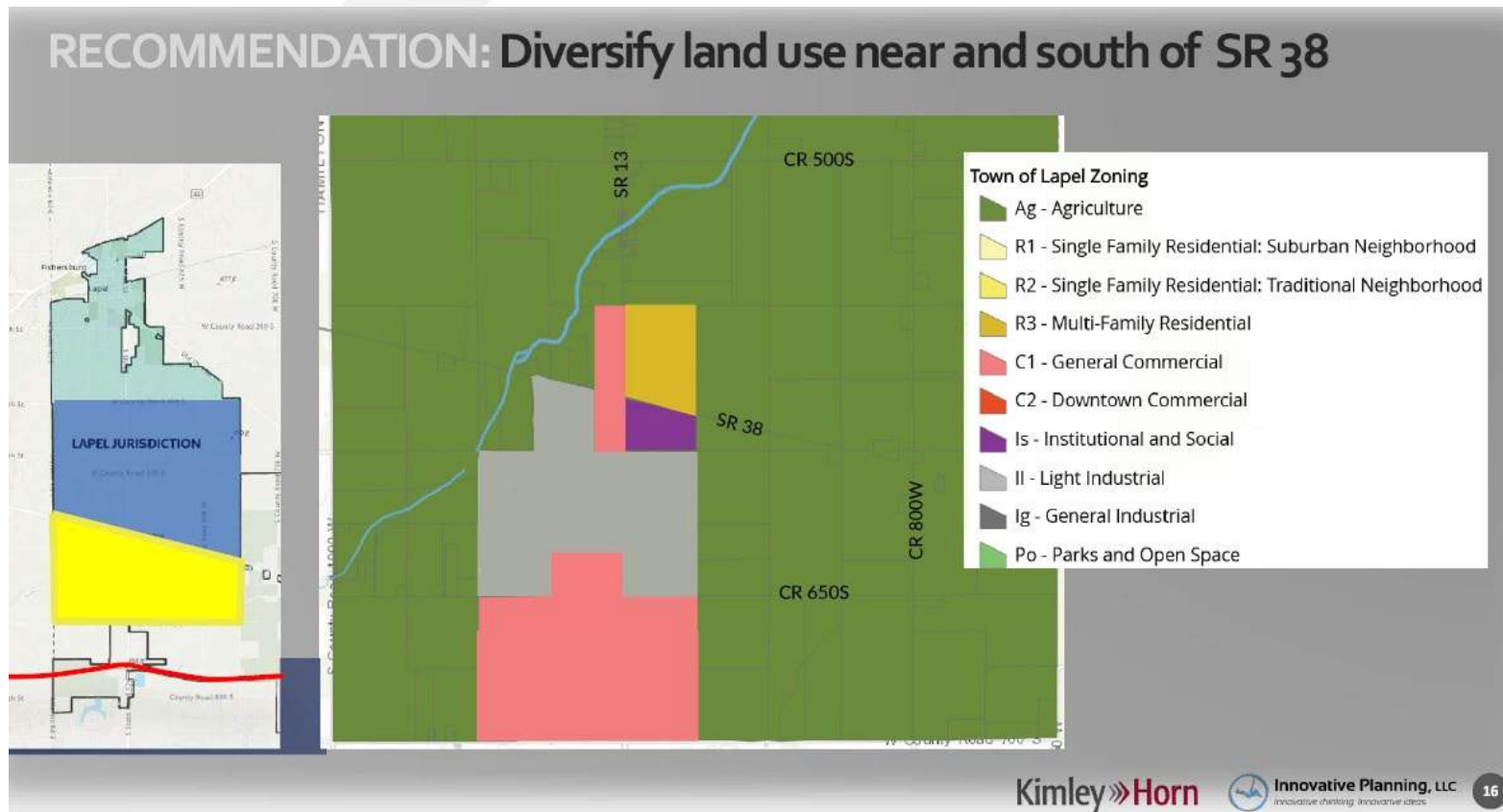
PARKING SCHEDULE

CAR PARKING	HANDICAP PARKING	TRAILER PARKING	FUTURE CAR PARKING	FUTURE TRAILER PARKING
72	4	0	0	0

DISCLAIMER:
 CONCEPTUAL SITE PLAN SUBJECT TO CHANGE
 PENDING FINAL DESIGN COORDINATION AND
 APPROVALS BY THE TOWN OF LAPEL

Lapel Findings of Fact for ReZone and PUDs

- 1. THE COMPREHENSIVE PLAN:** This proposed change of zoning supports the comprehensive plan **per the recommended land use (Industrial) for property near and south of SR 38.** This is found on page 16 of the Lapel Comprehensive Plan 2021 . See below



Lapel Findings of Fact for ReZone and PUDs

2. CHARACTERISTICS & CURRENT CONDITIONS: This proposed change of zoning supports the current conditions and the character of current structures and uses in each district. **The intended Industrial land use complies with the master plan's recommended use for property near and south of SR 38. The existing metal barn structure will be razed during construction.**

3. DESIRED USE: This proposed change of zoning supports the most desirable use for which the land in each district is adapted because **it complies with the master plan's recommended land use for property near and south of SR 38.**

4. PROPERTY VALUES: This proposed change of zoning supports the conservation of property values throughout the jurisdiction because **the new distribution improvements exceed the current value of the vacant land utilized for agricultural/farming operations.**

5. GROWTH MANAGEMENT: This proposed change of zoning supports responsible development and growth because **the new distribution warehouse complies with the master plan's recommended land use.**

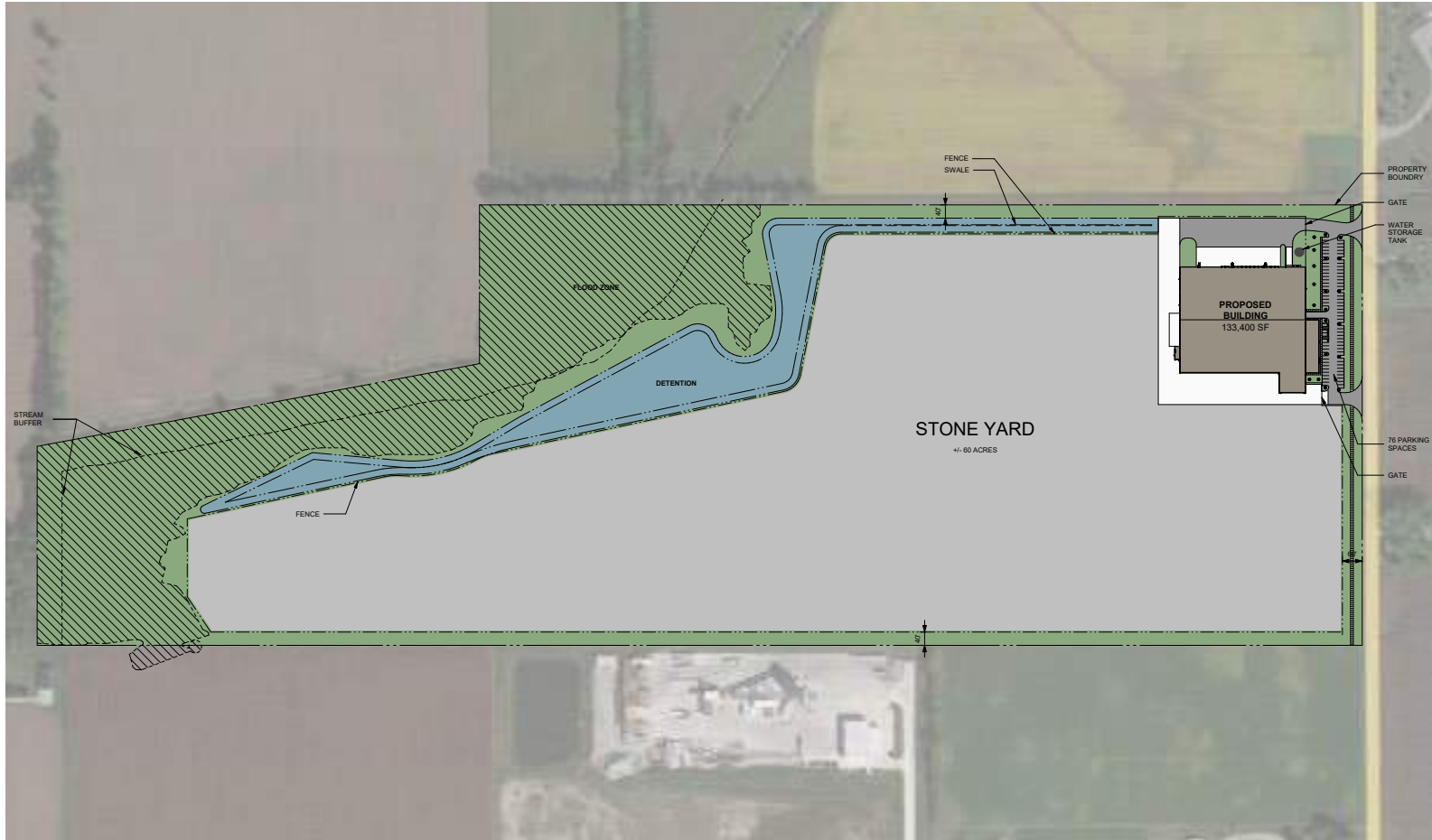
SPECIAL USE REQUEST: If the General Industrial ReZone is approved, Petitioner will submit a Special Use Request to the Advisory Board of Zoning Appeals to allow Outside Storage in the stone yard (enclosed by fence and landscape buffer)

Thank You – Questions?

LKQ Corporation takes pride in working with the community and preserving the environment.

LKQ has been credited with raising industry standards and continues to set itself apart by partnering with local businesses and demonstrating its stewardship of making the necessary investments in not only its business, but also within the communities it serves.

EXHIBIT 4. CONCEPT SITE PLAN



SEAL:
NOT FOR CONSTRUCTION

SUBMITTALS / REVISIONS:

NO.	DATE	DESCRIPTION
1	2023.06.07	SCHEMATIC SET

PROJECT NO.: 19-1700
 DRAWN BY: DFW

SHEET TITLE:
ARCHITECTURAL SITE PLAN

These plan drawings are the property of the registered Designer / Engineer and may not be copied, reproduced or used without their written permission.

SHEET NO.:

A100

PARKING SCHEDULE				
CAR PARKING	HANDICAP PARKING	TRAILER PARKING	FUTURE CAR PARKING	FUTURE TRAILER PARKING
72	4	0	0	0

DISCLAIMER:
 CONCEPTUAL SITE PLAN SUBJECT TO CHANGE
 PENDING FINAL DESIGN COORDINATION AND
 APPROVALS BY THE TOWN OF LAPEL

 1 A100 PRESENTATION SITE PLAN
 SCALE: 1" = 160'-0"

EXHIBIT 5. SITE AND VICINITY PICTURES





Looking south along SR 13 from the southeastern corner of the subject site.



EXHIBIT 6.RECOMMENDED LAND USE MAP

Comprehensive Plan Proposed Land Use - Entire Town of Lapel

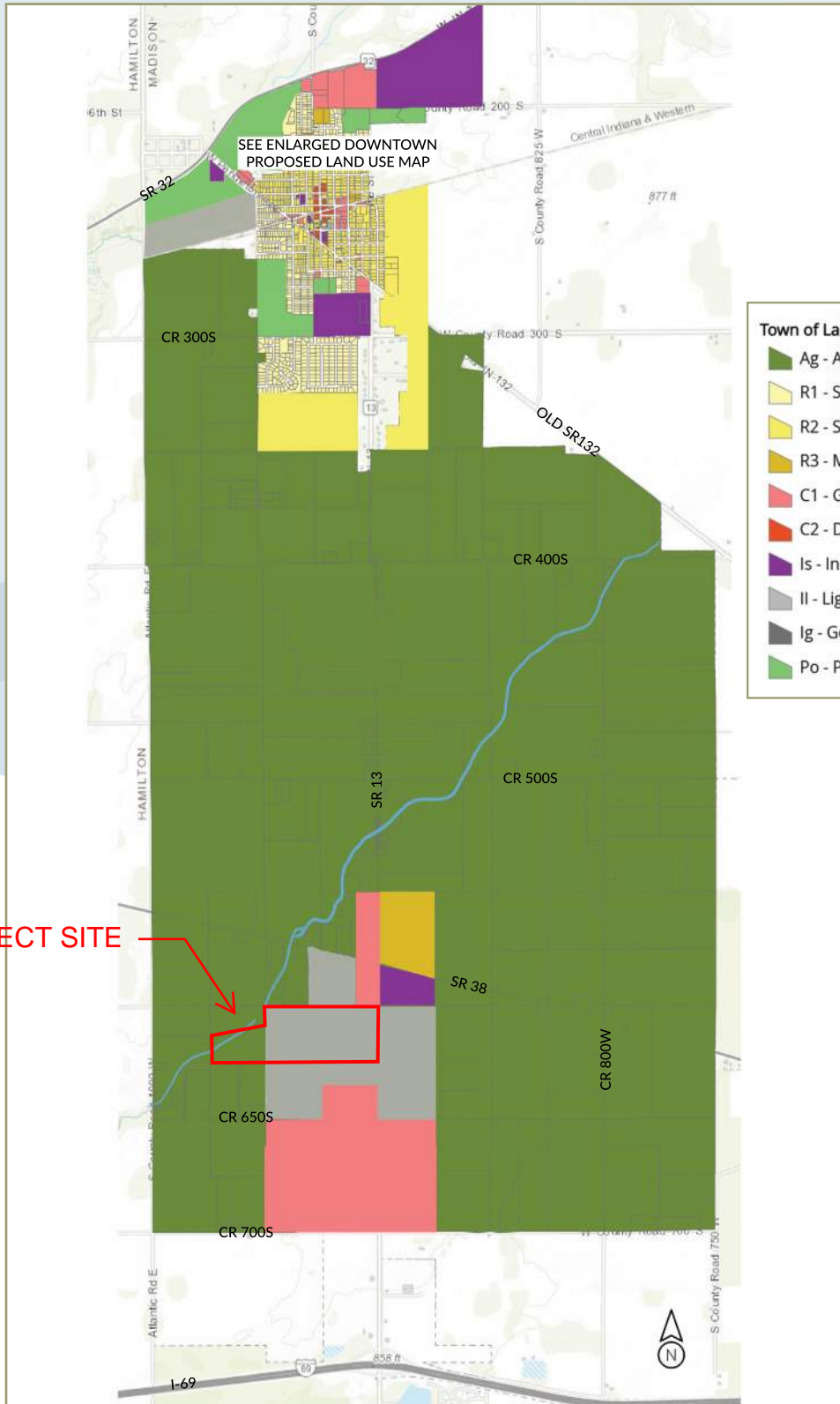
LAND USE

TRANSPORTATION

ECONOMIC DEVELOPMENT

NATURAL RESOURCES

APPENDIX



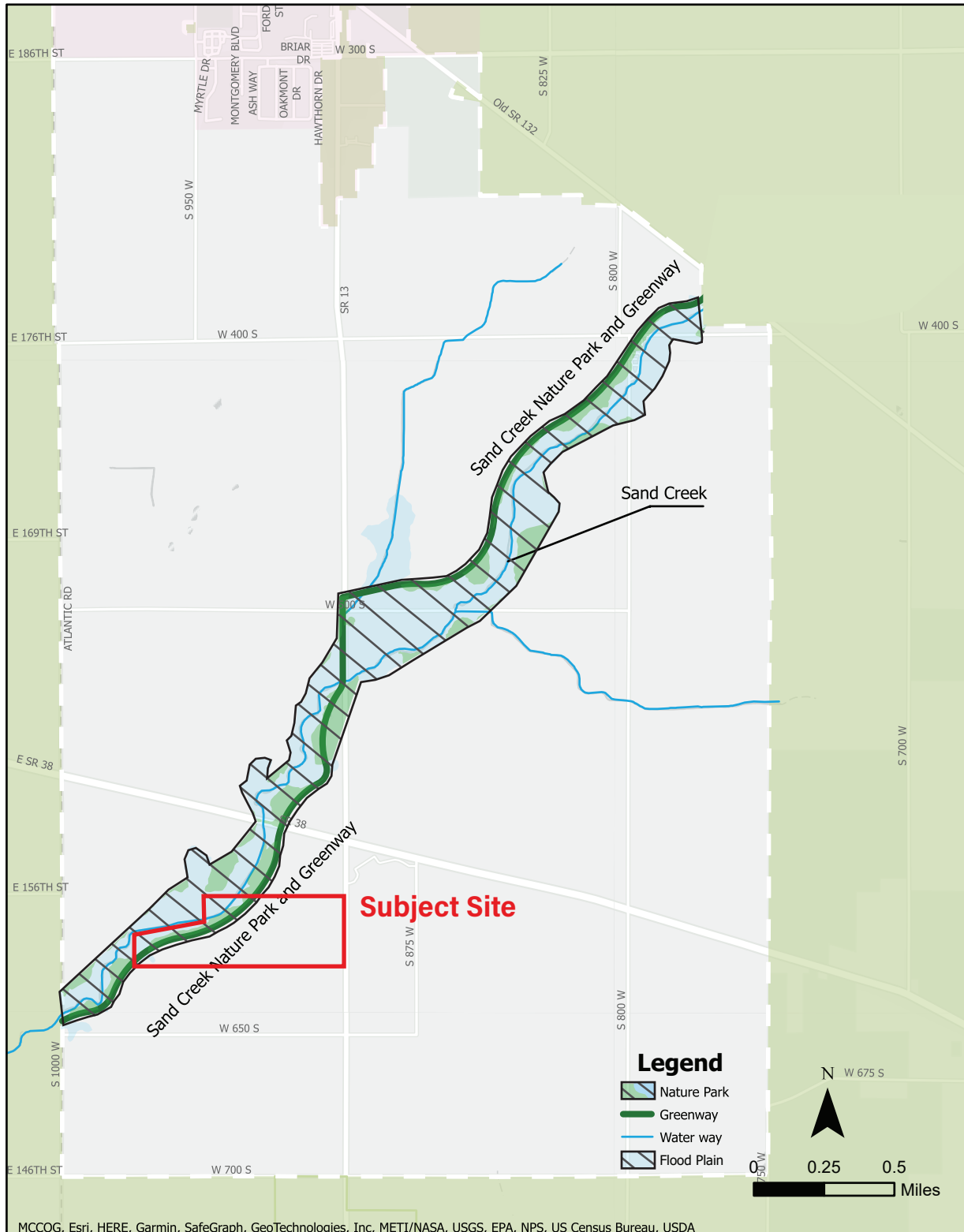
Town of Lapel Zoning

- Ag - Agriculture
- R1 - Single Family Residential: Suburban Neighborhood
- R2 - Single Family Residential: Traditional Neighborhood
- R3 - Multi-Family Residential
- C1 - General Commercial
- C2 - Downtown Commercial
- Is - Institutional and Social
- Ii - Light Industrial
- Ig - General Industrial
- Po - Parks and Open Space

SUBJECT SITE

EXHIBIT 7. Lapel Parks Master Plan

Sand Creek Nature Park & Greenway



Lapel Nature Park & Sand Creek Greenway

EXHIBIT A



Oksana Polhuy <oksana@lapelindiana.org>

FW: Auto parts salvage business

2 messages

Town of Lapel <info@lapelindiana.org>

Thu, Jul 13, 2023 at 2:31 PM

To: Oksana Polhuy <oksana@lapelindiana.org>, Noah Bozell <noah@lapelindiana.org>, Andrea Baldwin <angelsontherun2@aol.com>, Angie Calloway <angierduncan1@gmail.com>, Brian Robertson <brian@lapelindiana.org>, Dan Paddock <djpaddock54@gmail.com>, Jeff Keith <jeff.keith@gmail.com>, Matt Wood <matthew.wood77@yahoo.com>, Paula Lee <lapelclerk@hotmail.com>

Good afternoon,

The email below is from Greg Valentine who is unable to attend this evening, I assured him I would forward this to the Planning Commission for review.

Paula

From: Greg Valentine [mailto:greg.valentine1945@yahoo.com]

Sent: Thursday, July 13, 2023 1:47 PM

To: info@lapelindiana.org

Subject: Auto parts salvage business

To: Lapel Planning Commission

From: Greg Valentine

5297 S CR 800 W

Lapel

Subject: Proposed Auto Parts Salvage Business

I have concerns with this proposed business at the SR 13 location:

*For visitors or potential buyers coming into town on SR13 being a main corridor off the interstate, do you want them to see a hundred acre parts and car chassis storage business as they come into town

* It is across from the TLC Church daycare and preschool.....many parents coming in and out of the West driveway

* SR 13 has a lot of morning and evening traffic at that location.....high flow area

* The proposed site sits on top the aquifer that feeds Lapel town and Citizens Water that feeds many customers to the South
This aquifer is known to be only 90 feet deep

* Even though the company says they drain all fluids from vehicles, at some point in time there will be leaks. As a lifelong Farmer I can tell you the existing tile ditches below the soil all discharge into Thorpe Creek and it into Geist Reservoir, with some becoming Indianapolis Water Company drinking water

- * Pendleton and Anderson pushed back at this proposal so how would it benefit Lapel
- * This business will diminish the value of Carolyn Wilson's property adjacent, which goes to the intersection of SRs 13 & 38
- * I own 13 acres across the field directly North of this location which currently is a potential site for my son to build a house
He should not have to look at this auto chassis storage lot for 5-7,000 vehicles
- * As the current Green Township Trustee, I believe our taxpayers would like to see a more attractive business on this parcel

Thanks for listening and I appreciate all courtesies extended,

Greg Valentine

Jeff Keith <jeff.keith@gmail.com>

Thu, Jul 13, 2023 at 3:20 PM

To: Town of Lapel <info@lapelindiana.org>

Cc: Oksana Polhuy <oksana@lapelindiana.org>, Noah Bozell <noah@lapelindiana.org>, Andrea Baldwin <angelsontherun2@aol.com>, Angie Calloway <angierduncan1@gmail.com>, Brian Robertson <brian@lapelindiana.org>, Dan Paddock <djpaddock54@gmail.com>, Matt Wood <matthew.wood77@yahoo.com>, Paula Lee <lapelclerk@hotmail.com>

I will not make the start of the meeting tonight. Depending on baseball, I may trying to make it by the end.

Jeff

Sent from my iPhone

On Jul 13, 2023, at 2:31 PM, Town of Lapel <info@lapelindiana.org> wrote:

[Quoted text hidden]



Oksana Polhuy <oksana@lapelindiana.org>

FW: Public Hearing - Case #REZ-2023-02 6199 S St Rd 13

1 message

Town of Lapel <info@lapelindiana.org>

Thu, Jul 13, 2023 at 2:32 PM

To: Oksana Polhuy <oksana@lapelindiana.org>, Noah Bozell <noah@lapelindiana.org>, Andrea Baldwin <angelsontherun2@aol.com>, Angie Calloway <angierduncan1@gmail.com>, Brian Robertson <brian@lapelindiana.org>, Dan Paddock <djpaddock54@gmail.com>, Jeff Keith <jeff.keith@gmail.com>, Matt Wood <matthew.wood77@yahoo.com>, Paula Lee <lapelclerk@hotmail.com>

Below is another email from a resident in the area.

Paula

From: Kathy Young [mailto:kyoung2410@embarqmail.com]

Sent: Thursday, July 13, 2023 11:25 AM

To: info@lapelindiana.org

Subject: Public Hearing - Case #REZ-2023-02 6199 S St Rd 13

To Whom It May Concern:

Please be advised that as an adjacent landowner, I am OPPOSED to the project proposed for the property located at [6199 S. St Rd 13, Lapel, IN.](#)

As an adjacent landowner, I am concerned with the proposed use (vehicle recycling) and it's impact on the water resources as this parcel of land connects to and impacts the county ditch and it's water resources. This county ditch waterway affects all landowners along the ditch and the community at large. Storage of inoperable vehicles on the property leads to the risk of drainage of oil, battery acid, vehicle fluids, etc. onto the property and into the waterway. This is not acceptable. Water resources in the area are important to the whole community and should be protected against possible contamination. The proposed project is not suitable for this parcel of land and approval should not be granted.

In addition to the water quality issues, this project (auto recycling facility) is not the best and highest use for the proposed site. Being located along a state highway, as well as, a main thoroughfare to the entrance of the town, the parcel should be utilized for a higher value, more aesthetically appealing use; not a junkyard! Are there not more appealing commercial/residential/agricultural uses for this property? Land resources are limited; therefore, the council should ensure they are utilized in the best and highest possible way. Adding an auto recycling (junkyard) facility is not a best use plan.

I am unable to attend the hearing for this project, but I am notifying you that I am OPPOSED to the proposed project for this property location and request that the Council not approve it.

Respectfully,

Kathleen A. Young

9337 W. State Road 38

Lapel, IN 46051

EXHIBIT B. Wellhead Protected Area

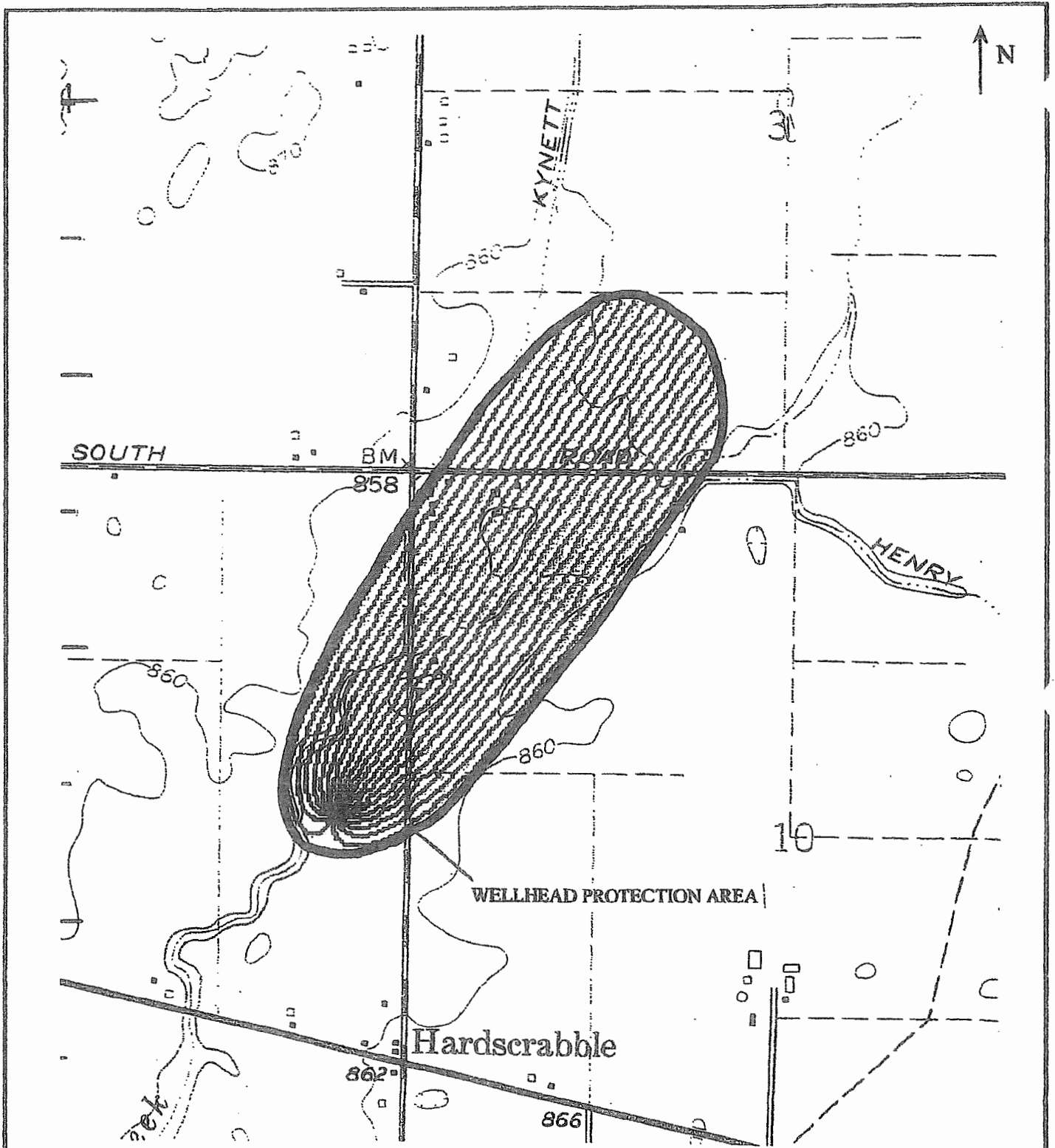
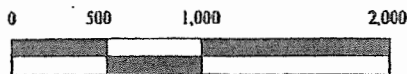


Figure 4-6. Town of Lapel - Wellhead Protection Area for the South Well

SCALE: 1" = 1,000'



Hydrophase, Inc.

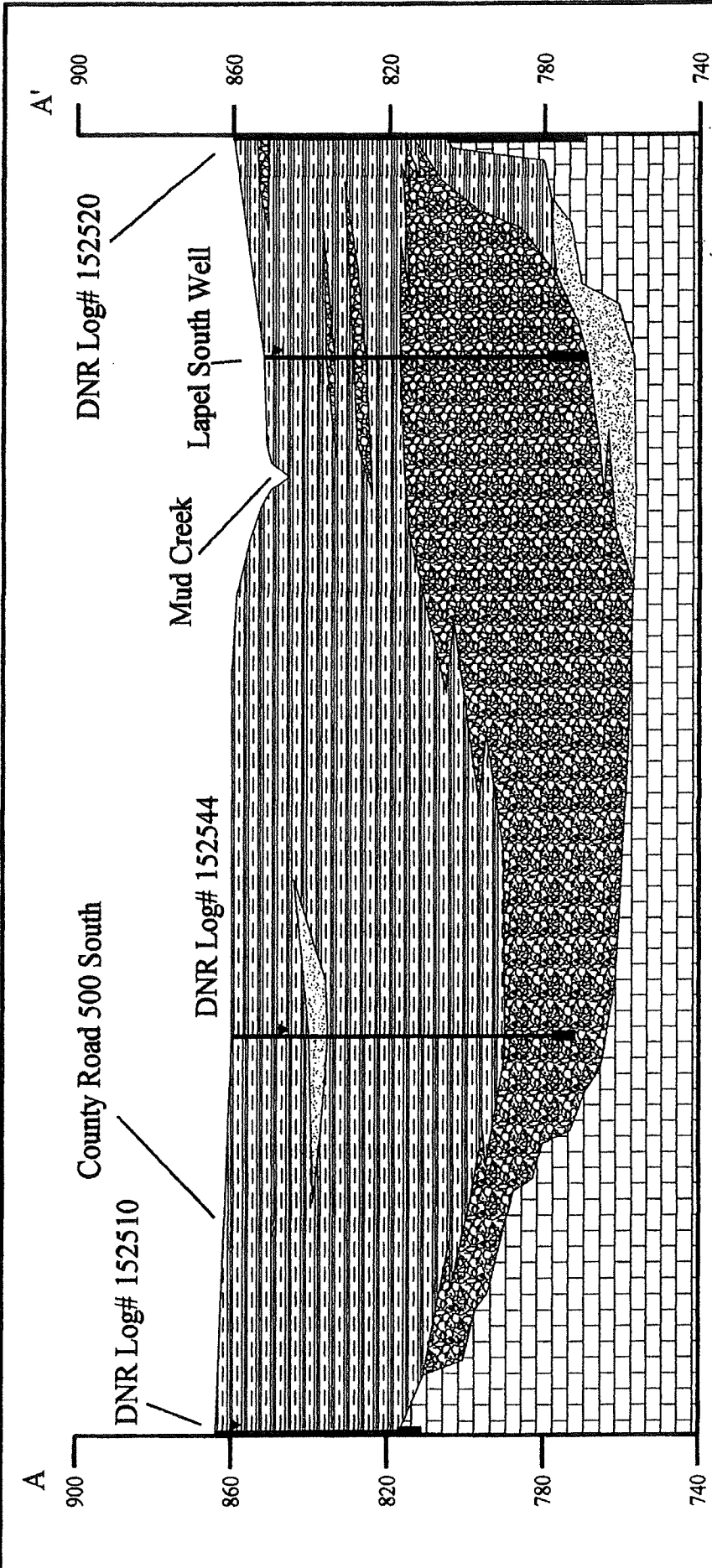









Figure 4-4. Interpretive Geologic Cross Section A-A' (Northwest to Southeast).

<p>Gravel & Sand</p> 	<p>Clay/Till</p> 	<p>Water Level (if known)</p> 	<p>Well with Screen or open borehole</p> 	<p>Hydrophase, Inc.</p> 
<p>Sand</p> 	<p>Limestone</p> 	<p>HORIZONTAL SCALE: 1" = 600'</p> <p>VERTICAL SCALE: 1" = 40'</p> <p>VERTICAL EXAGGERATION = 15</p>		

Lapeer Water Department South IN13 Wellfield



500

13

State Road 13

0.4 Miles

0.2

0.1

0

Well



5 YR Time of Travel
Wellhead Protection
Area



Created by Alliance
Indiana Rural Water
February 2022



Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus
IGN, and the GIS User Community

EXHIBIT E



Oksana Polhuy <oksana@lapelindiana.org>

RE: LKQ Development

Chris Farrar <chris@woodside-capital.com>

Thu, Jul 20, 2023 at 2:50 PM

To: "oksana@lapelindiana.org" <oksana@lapelindiana.org>, "planning@lapelindiana.org" <planning@lapelindiana.org>, "teresa@lapelindiana.org" <teresa@lapelindiana.org>

Members of the Planning Commission,

Thank you again for the opportunity to present our project at last week's meeting. Below, I have provided additional comments on the items that were covered in more detail during the public discussion.

- **EPA Fines** - Any EPA referenced fines or issues are entirely administrative. Examples are missing paperwork, delayed responding, etc. These responsibilities are with the local facility managers and on occasion they might miss a deadline. Under no circumstance are these issues due to contamination or facility operations.
- **Neighboring Property Owner Lawsuit** - This is simply the case of an angry neighbor. The neighbor never accepted the fact the City annexed the property to be part of an industrial zoned area. LKQ complied with all conditional and special uses put on the property by the city of Burleson, TX. If a neighbor wants to sue a company, unfortunately they cannot prevent it. The time LKQ's local office was spending defending themselves was effecting their operation. LKQ made a decision to pay the neighbor to end the silliness.
- **Dust** - For LKQ's most recent industrial projects, they made a decision to use only natural stone (not crushed concrete or other aggregate that breaks down easily). This has limited dust dramatically. We also use a compaction method and fabric filter during installation to limit movement of the stone which further reduces the dust.
- **No Improvements within the 100 yr Floodplain** - The attached site plan clearly shows NO IMPROVEMENTS in the 100 year flood plain. The public's comment about LKQ's project affecting neighboring property owner's drainage is not accurate. Furthermore, this floodplain area is being dedicated to Lapel's green space and park improvement area.
- **Aquifer** – Rob Spark's team (Madison County Economic Development) will be providing additional information they have received from IDEM concerning the aquifer's location and wellhead protection area.

Lastly, I have included a hyperlink (<https://youtu.be/z4-j7z5uGIA>) for a short video that was presented to the Town of Lapel when LKQ was first considering this location. It may help answer lingering questions on the daily operations at the newly developed recycling facilities.

Regards,

Chris Farrar | Woodside Capital Advisors

[2500 E TC Jester Blvd Suite 150H](#)

[Houston TX 77008](#)

Phone [\(713\) 924-8317](tel:(713)924-8317)

www.woodside-capital.com

**EXHIBIT F. PICTURES OF A SIMILAR LKQ FACILITY
BUILT in Watkins, CO**







LKQ Corporation (LKQ)

NASDAQ: LKQ · IEX Real-Time Price · USD

58.52 -0.49 (-0.83%)

Jul 13, 2023, 3:59 PM EDT - Market closed

Overview Financials **Statistics** Forecast Dividends Profile Chart

Statistics **Market Cap** Revenue

LKQ Corporation Market Cap

i LKQ Corporation has a market cap or net worth of \$15.64 billion as of July 13, 2023. Its market cap has increased by 11.45% in one year.

Market Cap

15.64B

1-Year Change

11.45%

Category

Large-Cap

Enterprise Value

19.38B

Ranking

599

Stock Price

\$58.52

Market Cap Chart

\$

%

⋮

Range 1M 6M YTD 1Y 3Y 5Y 10Y **Max**

Oct 5, 2003 → Jul 11

📌 Since October 6, 2003, LKQ Corporation's market cap has increased from \$286.10M to \$15.64B, an increase of 5,367.25%. That is a compound annual growth rate of 22.42%.

History

Daily ▾

Export ▾

Date	Market Cap	% Change
Jul 12, 2023	15.77B	1.74%
Jul 11, 2023	15.50B	0.82%
Jul 10, 2023	15.38B	0.59%
Jul 7, 2023	15.29B	0.44%
Jul 6, 2023	15.22B	-1.16%
Jul 5, 2023	15.40B	-1.12%
Jul 3, 2023	15.57B	-0.02%
Jun 30, 2023	15.58B	0.97%
Jun 29, 2023	15.43B	1.28%
Jun 28, 2023	15.23B	-0.03%
Jun 27, 2023	15.24B	3.11%
Jun 26, 2023	14.78B	1.58%
Jun 23, 2023	14.55B	-0.33%
Jun 22, 2023	14.59B	-0.69%
Jun 21, 2023	14.70B	1.42%
Jun 20, 2023	14.49B	-0.04%
Jun 16, 2023	14.50B	-0.53%
Jun 15, 2023	14.57B	0.09%

Date	Market Cap	% Change
Jun 14, 2023	14.56B	-0.78%
Jun 13, 2023	14.67B	0.60%
Jun 12, 2023	14.59B	0.50%
Jun 9, 2023	14.51B	0.65%
Jun 8, 2023	14.42B	-0.97%
Jun 7, 2023	14.56B	0.87%
Jun 6, 2023	14.44B	0.97%

View and export this data all the way back to 2003. Start Free Trial.

Market Capitalization

Market capitalization, also called net worth, is the total value of all of a company's outstanding shares. It is calculated by multiplying the stock price by the number of shares outstanding.

Formula: Market Cap = Stock Price * Shares Outstanding

Full Definition

Related Stocks

Company	Market Cap
Expedia Group	17.19B
MGM Resorts International	17.12B
Magna International	17.02B
Lucid Group	16.28B
Chewy	15.98B
Amcor	14.55B

Company	Market Cap
Deckers Outdoor	14.47B
DraftKings	14.08B

Market Cap Rankings

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**Potomac German Auto, Inc. and LKQ Northeast, Inc.
(subsidiaries of LKQ Corporation)**

**NOTICE OF INTENT TO FILE CONSENT AGREEMENT AND FINAL ORDER
ASSESSING ADMINISTRATIVE PENALTY
AND OPPORTUNITY FOR PUBLIC COMMENT**

**U.S. ENVIRONMENTAL PROTECTION AGENCY MID-ATLANTIC REGION
Enforcement & Compliance Assurance Division (3ED32)
Philadelphia, Pennsylvania 19103**

Date of Notice: October 8, 20201

Permit No.: MDR002262 (Jessup), MDR0030743 (Mt. Airy), MDR002259 (Edgewood), MDR002069 (Frederick), MDR001257 (Erdman), MDR001880 (Hawkins Point), MDR001037 (Easton), General Industrial Stormwater Permit PAG-03 (York Haven)

Docket Number: CWA-03-2022-0017

Comments will be accepted until November 17, 2021

In accordance with Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g) AND 40 C.F.R. § 22.45, the U.S. Environmental Protection Agency Region III (EPA Mid-Atlantic Region), hereby gives notice that it is proposing to file a Consent Agreement and Final Order (CAFO) assessing an administrative civil penalty in the amount of one hundred and thirty thousand dollars (\$130,000.00) against the Respondents named below for alleged violations of their NPDES Permits.

RESPONDENTS:

Potomac German Auto, Inc. and LKQ Northeast, Inc.
(subsidiaries of LKQ Corporation)
500 West Madison Street, Suite 2800,
Chicago, IL 60661

SUMMARY OF VIOLATIONS: EPA Mid-Atlantic Region alleges the following violations of National Pollutant Discharge Elimination System (NPDES) Permit Nos. MDR002262 (Jessup), MDR0030743 (Mt. Airy), MDR002259 (Edgewood), MDR002069 (Frederick), MDR001257 (Erdman), MDR001880 (Hawkins Point), MDR001037 (Easton), General Industrial Stormwater Permit PAG-03 (York Haven):

1. Failure to comply with permit requirements concerning the Storm Water Pollution Prevention Plan ("SWPPP") at one facility;
2. Failure to comply with permit requirements concerning the Preparedness, Prevention and Contingency ("PPC") Plan at one facility;
3. Failure to implement adequate control measures or take corrective action at three facilities;
4. Failure to provide adequate erosion and sediment controls at three facilities;
5. Failure to adequately conduct or report compliance - quarterly visual inspection at five facilities;
6. Failure to adequately conduct or report compliance - benchmark monitoring at one facility; and
7. Failure to conduct or adequately document routine inspections at six facilities. Failure to conduct composite sampling.

These failures constitute violations of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342.

OPPORTUNITY FOR COMMENT: If you wish to comment on the CAFO, submit via email a statement to the EPA Mid-Atlantic Region Enforcement & Compliance Assurance Division Director. Email this statement directly to the Regional Hearing Clerk (email below) within 40 days of the date of this public notice. Comments received within this 40-day period will be considered. All comments must include the name, address, and telephone number of the writer and a concise statement of the basis for any comment and any relevant facts on which it is based.

All comments should be emailed to:

Regional Hearing Clerk
U.S. EPA, Mid-Atlantic Region
R3_Hearing_Clerk@epa.gov

AVAILABILITY OF INFORMATION: You may request information relevant to the Consent Agreement and Final Order through the Regional Hearing Clerk.

REGISTRY OF INTERESTED PERSONS: Any person interested in a particular case or group of cases may leave their name, address, and telephone number on a registry of interested persons which will be maintained in each file. The list of names will be maintained as a means for persons with an interest in the case to contact others with the same interest.

FOR FURTHER INFORMATION: Interested parties may contact the following EPA representatives to learn more about this action.

Shane McAleer
U.S. Environmental Protection Agency
215-814-5616
mcaleer.shane@epa.gov

or

Chuck Schadel
U.S. Environmental Protection Agency
215-814-5761
Schadel.Chuck@epa.gov

or

Natalie Katz
Office of Regional Counsel
U.S. Environmental Protection Agency
215-814-2615
katz.natalie@epa.gov

[Basic Search](#) | [Summaries](#) | [Advanced Search](#)

Violation Tracker Current Parent Company Summary

Current Parent Company Name: LKQ

Ownership Structure: publicly traded (ticker symbol LKQ)

Headquartered in: Illinois

Major Industry: wholesalers

Specific Industry: wholesalers-auto parts

Penalty total since 2000: \$7,212,503

Number of records: 58

TOP 5 OFFENSE GROUPS (<u>GROUPS DEFINED</u>)	PENALTY TOTAL	NUMBER OF RECORDS
environment-related offenses	\$6,525,986	18
safety-related offenses	\$419,322	35
employment-related offenses	\$267,195	5

TOP 5 PRIMARY OFFENSE TYPES	PENALTY TOTAL	NUMBER OF RECORDS
environmental violation	\$6,525,986	18
workplace safety or health violation	\$349,322	33
wage and hour violation	\$135,658	1
labor relations violation	\$86,000	2
aviation safety violation	\$70,000	2

Notes: Parent-subsidary linkages are based on relationships current as of the latest revision listed in the [Update Log](#), which may vary from what was the case when a violation occurred. The penalty totals are adjusted to account for the fact that the individual entries below may include both agency records and settlement announcements for the same case; or else a penalty covering multiple locations may be listed in the individual records for each of the facilities. The totals are also adjusted to reflect cases in which federal and state or local agencies cooperated and issued separate announcements of the outcome. Duplicate or overlapping penalty amounts are marked with an asterisk in the list below.

Links: Subsidy Tracker data on financial assistance to this company by federal, state and local government agencies can be found [here](#).

Individual Penalty Records:

Click on the company or penalty amount for more information on each case.

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<u>COMPANY</u>	<u>PRIMARY OFFENSE TYPE</u>	<u>YEAR</u>	<u>AGENCY</u>	<u>PENALTY AMOUNT</u>
Keystone Automotive	environmental violation	2022	EPA	\$2,500,000
KEYSTONE AUTOMOTIVE OPERATIONS, INC.	environmental violation	2022	EPA	\$2,500,000
LKQ Corporation	environmental violation	2018	CA-ARB	\$294,000
LKQ Northeast, Inc.	environmental violation	2021	EPA	\$293,425
LKQ BIRMINGHAM	environmental violation	2023	EPA	\$250,000
LKQ Pick Your Part	environmental violation	2021	MD-ENV	\$200,000
LKQ Corporation	wage and hour violation	2008	WHD	\$135,658
LKQ New England - Webster	environmental violation	2021	EPA	\$129,425

<u>COMPANY</u>	<u>PRIMARY OFFENSE TYPE</u>	<u>YEAR</u>	<u>AGENCY</u>	<u>PENALTY AMOUNT</u>
<u>LKQ New England</u>	environmental violation	2021	EPA	<u>\$83,000</u>
<u>LKQ New England - Southwick</u>	environmental violation	2021	EPA	<u>\$81,000</u>
<u>LKQ MONTGOMERY, AL</u>	environmental violation	2023	EPA	<u>\$75,000</u>
<u>Keystone Automotive Industries, Inc.</u>	labor relations violation	2012	NLRB	<u>\$61,000</u>
<u>LKQ PICK YOUR PART SOUTHEAST LLC</u>	environmental violation	2023	EPA	<u>\$60,000</u>
<u>KEYSTONE AUTOMOTIVE</u>	aviation safety violation	2011	FAA	<u>\$50,000</u>
<u>Keystone Automotive Industries, Inc.</u>	Family and Medical Leave Act	2015	WHD	<u>\$38,864</u>
<u>PGW AUTO GLASS, LLC</u>	workplace safety or health violation	2018	OSHA	<u>\$28,277</u>
<u>Keystone Automotive Industries, Inc.</u>	labor relations violation	2009	NLRB	<u>\$25,000</u>
<u>LKQ ROUTE 16 USED AUTO PARTS, INC.</u>	workplace safety or health violation	2012	OSHA	<u>\$22,275</u>
<u>LKQ ATLANTA L.P.</u>	workplace safety or health violation	2011	OSHA	<u>\$21,000</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES</u>	aviation safety violation	2015	FAA	<u>\$20,000</u>
<u>LKQ PICK YOUR PART</u>	workplace safety or health violation	2017	OSHA	<u>\$18,000</u>
<u>LKQ CORPORATION / LKQ NORTHERN CALIFORNIA</u>	workplace safety or health violation	2019	OSHA	<u>\$18,000</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES INC.</u>	workplace safety or health violation	2014	OSHA	<u>\$16,200</u>
<u>LKQ PICK YOUR PART MIDWEST, LLC</u>	workplace safety or health violation	2022	OSHA	<u>\$15,625</u>

<u>COMPANY</u>	<u>PRIMARY OFFENSE TYPE</u>	<u>YEAR</u>	<u>AGENCY</u>	<u>PENALTY AMOUNT</u>
<u>Keysone Automotive Industries</u>	environmental violation	2009	EPA	<u>\$15,345</u>
<u>LKQ MIDWEST AUTO PARTS CORP.</u>	workplace safety or health violation	2019	OSHA	<u>\$15,148</u>
<u>KEYSTONE AUTOMOTIVE DBA CCI INC.</u>	workplace safety or health violation	2010	OSHA	<u>\$13,050</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES, INC.</u>	workplace safety or health violation	2012	OSHA	<u>\$12,500</u>
<u>KEYSTONE AUTOMOTIVE OF MACON</u>	workplace safety or health violation	2011	OSHA	<u>\$12,000</u>
<u>Keystone Automotive Industries, Inc.</u>	environmental violation	2010	ME-ENV	<u>\$11,350</u>
<u>LKQ HEAVY TRUCK JACKSON</u>	workplace safety or health violation	2017	OSHA	<u>\$10,805</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES, INC.</u>	workplace safety or health violation	2003	OSHA	<u>\$10,200</u>
<u>LKQ ROUTE 16 USED AUTO PARTS, INC.</u>	workplace safety or health violation	2015	OSHA	<u>\$9,695</u>
<u>LKQ ROUTE 16 USED AUTO PARTS, INC.</u>	environmental violation	2008	MA-ENV	<u>\$9,000</u>
<u>LKQ ROUTE 16 USED AUTO PARTS, INC.</u>	environmental violation	2008	MA-ENV	<u>\$9,000</u>
<u>LKQ SOUTHEAST, INC.</u>	workplace safety or health violation	2018	OSHA	<u>\$8,732</u>
<u>LKQ OF MICHIGAN</u>	workplace safety or health violation	2017	OSHA	<u>\$8,350</u>
<u>AIM RECYCLING FLORIDA, LLC</u>	workplace safety or health violation	2018	OSHA	<u>\$8,148</u>
<u>LKQ SALISBURY, INC. DBA LKQ SELF SERVICE EAST NC</u>	workplace safety or health violation	2012	OSHA	<u>\$7,800</u>
<u>LKQ PICK YOUR PART SOUTHEAST, LLC</u>	workplace safety or health violation	2021	OSHA	<u>\$7,635</u>

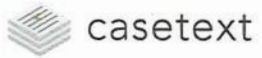
<u>COMPANY</u>	<u>PRIMARY OFFENSE TYPE</u>	<u>YEAR</u>	<u>AGENCY</u>	<u>PENALTY AMOUNT</u>
<u>LKQ OF SOUTHERN CALIFORNIA</u>	workplace safety or health violation	2006	OSHA	<u>\$7,470</u>
<u>LKQ SALISBURY,INC. DBA LKQ SELF SERVICE EAST NC</u>	workplace safety or health violation	2012	OSHA	<u>\$7,100</u>
<u>LKQ APEX AUTOPARTS INC.</u>	workplace safety or health violation	2017	OSHA	<u>\$7,000</u>
<u>LKQ LAKENOR AUTO COMPANY</u>	workplace safety or health violation	2018	OSHA	<u>\$6,895</u>
<u>KEYSTONE AUTOMOTIVE</u>	workplace safety or health violation	2005	OSHA	<u>\$6,695</u>
<u>LKQ PGW Holdings, LLC</u>	Family and Medical Leave Act	2018	WHD	<u>\$6,673</u>
<u>LKQ GREAT LAKES CORP.</u>	workplace safety or health violation	2015	OSHA	<u>\$6,500</u>
<u>LKQ NORTHEAST, INC.</u>	workplace safety or health violation	2023	OSHA	<u>\$6,339</u>
<u>LKQ TRIPLETT ASAP, INC.</u>	workplace safety or health violation	2007	OSHA	<u>\$6,000</u>
<u>LKQ BROADWAY AUTO PARTS, INC.</u>	workplace safety or health violation	2012	OSHA	<u>\$5,700</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES</u>	workplace safety or health violation	2006	OSHA	<u>\$5,500</u>
<u>AIM RECYCLING FLORIDA, LLC</u>	workplace safety or health violation	2018	OSHA	<u>\$5,433</u>
<u>LKQ Foster Auto Parts, Inc.</u>	environmental violation	2020	OR-ENV	<u>\$5,400</u>
<u>KEYSTONE AUTOMOTIVE OPERATIONS INC</u>	workplace safety or health violation	2015	OSHA	<u>\$5,250</u>
<u>LKQ FOSTER AUTO PARTS, INC. (PICK-N-PULL NW LLC)</u>	environmental violation	2010	OR-ENV	<u>\$5,041</u>
<u>LKQ CORP</u>	environmental violation	2012	PA-ENV	<u>\$5,000</u>

<u>COMPANY</u>	<u>PRIMARY OFFENSE TYPE</u>	<u>YEAR</u>	<u>AGENCY</u>	<u>PENALTY AMOUNT</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES</u>	workplace safety or health violation	2006	OSHA	<u>\$5,000</u>
<u>KEYSTONE AUTOMOTIVE INDUSTRIES, INC. - LKQ CORP.</u>	workplace safety or health violation	2013	OSHA	<u>\$5,000</u>

(*): Penalty amounts marked by an asterisk are ones announced by more than one agency. Parent penalty totals are adjusted to avoid double-counting.

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Reed v. LKQ Corp.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Jan 30, 2020

436 F. Supp. 3d 892 (N.D. Tex. 2020)

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Civil Action No. 3:14-CV-4412-L

2020-01-30

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Chris REED, Plaintiff, v. LKQ CORPORATION, Defendant.

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Associates, Burleson, TX, for Defendant.

Sam A. Lindsay, United States District Judge

898 *898



Matthew W. Bobo, The Law Office of Matthew Bobo PLLC, John R Scotty MacLean, MacLean Firm PC, Fort Worth, TX, for Plaintiff.

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Sam A. Lindsay, United States District Judge

MEMORANDUM OPINION AND ORDER

The court makes the following findings of fact and conclusions of law by a preponderance of the evidence¹ pursuant to Rule 52(a) of the Federal Rules of Civil Procedure² following a hearing and bench trial.

¹ Proving a fact [] ev [] t the existence of a f [] ot. *Huddleston* , 459 U.S. 375, 390, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). Thus, to

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United States, 153 F.3d 225, 231 (5th Cir. 1998) (discussing standard for findings and conclusions under Federal Rule of Civil Procedure 52). In accordance with that standard, the court has not set out its findings and conclusions in “punctilious detail” or “slavishly trace[d] [] the claims issue by issue and witness by witness.” Neither has the court “indulge[d] in exegetics, or pars[ed] or declaim[ed] every fact and each nuance and hypothesis.” *Id.* (internal quotation marks and citations omitted). The court instead has limited its discussion to those legal and factual issues that form the basis for its decision. *Id.*

The facts contained herein are either undisputed or the court has made the finding based on the credibility or believability of each witness. In doing so, the court considered all of the circumstances under which the witness testified, including: the relationship of the witness to Plaintiff or Defendant; the interest, if any, the witness has in the outcome of the case; the witness’s appearance, demeanor, and manner of testifying while on the witness stand; the witness’s apparent candor and fairness, or the lack thereof; the reasonableness or unreasonableness of the witness’s testimony; the opportunity of the witness to observe or acquire knowledge concerning the facts to which he or she testified; the extent to which the witness was contradicted or supported by other credible evidence; and whether such contradiction related to an important factor in the case or some minor or unimportant detail. When necessary, the court comments on the credibility of a witness or

Finally, during the course of trial, the court may have carried various

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I. Procedural Background

On September 29, 2014, Chris Reed ("Mr. Reed" or "Plaintiff"), a homeowner in Burleson, Texas, filed this lawsuit in state court against LKQ Corporation 899 *899 ("LKQ" or "Defendant"), the owner and operator of a 71.5-acre automobile reclamation and parts distribution facility across from his property. Mr. Reed alleges that dust, debris, trash, and noise generated by LKQ's construction and operation of its salvage business substantially interfered with his use and enjoyment of his property, thereby constituting a private nuisance. Def.'s Not. of Removal, Ex. A (Pl.'s Orig. Pet.) (Doc. 1-2). He seeks to recover damages based on the alleged injury to property and personal harm under the tort-based doctrines of intentional nuisance, negligent nuisance, and abnormally dangerous activity nuisance (also known as strict liability nuisance). *Id.*

On December 17, 2014, LKQ removed the state action to federal court, contending that complete diversity of citizenship exists between the parties and that the amount in controversy, exclusive of interest and costs, exceeds \$75,000. Def.'s Not. of Removal 1 (Doc. 1). On February 10, 2015, with leave of court, Mr. Reed filed Plaintiff's First Amended Complaint ("Amended Complaint") (Doc. 11). Following discovery, on March 28, 2018, LKQ filed a motion for summary judgment. m: entitled to judgment as a matter of law because Mr. Reed had failed to raise a genuine

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The court held a bench trial on the remaining nuisance claims on September 12, 2018. The parties were represented by counsel. The court heard testimony from the following witnesses: Mr. Reed; his wife Natalie Reed (“Mrs. Reed”); and Steven Massey (“Mr. Massey”), LKQ’s corporate representative. The parties each filed Proposed Findings of Fact and Conclusions of Law on March 21, 2019. (Docs. 76 and 78). The official transcript from the bench trial was filed on August 7, 2019. (Tr. of Proceedings, hereinafter “Tr.”) (Doc. 81).³



³ On September 9, 2019, after granting the parties’ Agreed Motion Regarding Site Inspection and LKQ Operations (Doc. 86), the court visited and inspected Mr. Reed’s property and informed that parties that it was considering whether to reopen the evidence to include its observations from the site visit. After further review of the trial record, the court concludes that reopening the evidence is unnecessary and, accordingly, its findings of fact and conclusions of law are based solely on the evidence admitted at trial and testimony of the witnesses.

II. Subject Matter Jurisdiction

The court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a). Mr. Reed in  it  District Court of Johnson County, Texas. Doc. 5 Not. of Removal, Ex. 1 (Pl.’s Orig.

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it is a Delaware corporation and "does not have its principal place of business in Texas," and that Mr. Reed is a Texas citizen. *Id.* at 1. Accordingly, based on the Notice of Removal and Plaintiff's Original Petition, the court concludes that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

As part of its continuing duty to police its subject matter jurisdiction, *see* 900 *900 *Ruhrigas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), the court notes *sua sponte* that in the Amended Complaint, Mr. Reed alleges that he "is an individual who resides in Johnson County, Texas," and that LKQ "is a Texas corporation." Am. Compl. ¶¶ 1-2 (Doc. 11).⁴ In LKQ's Answer, it "admits the averments contained in Paragraph 1 of Plaintiff's First Amended Complaint," and "admits the averments contained in Paragraph 2 of Plaintiff's First Amended Complaint." Def.'s Ans. to Pl.'s First Am. Compl. ¶¶ 1-2 (Doc. 21). Although it would appear that complete diversity is not present based on the Amended Complaint and Answer thereto, as Mr. Reed and LKQ are both alleged to be Texas citizens, caselaw makes clear that "all challenges to subject-matter jurisdiction [are] premised upon diversity of citizenship against the state of facts that existed at the time of [removal]—whether the challenge be brought  Download PDF  Check Treatment or the first time on appeal." *Settlement Funding, L.L.C. v. Kapra Settlements, Ltd.*, 851 F.3d

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commencement and removal of the suit, it will not be destroyed by subsequent changes in the citizenship of the extant parties.”) (citations omitted).

- ⁴ Mr. Reed alleges he “resides in Johnson County, Texas.” Am. Compl. ¶ 1 (Doc. 11) (emphasis added). A natural person is considered a citizen of the state where that person is domiciled, that is, where the person has a fixed residence with the intent to remain there indefinitely. See *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 555-56 (5th Cir. 1985). “‘Citizenship’ and ‘residency’ are not synonymous.” *Parker v. Overman*, 59 U.S. (18 How.) 137, 141, 15 L.Ed. 318 (1855). “For diversity purposes, citizenship means domicile; mere residence in [a] [s]tate is not sufficient.” *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 485 F.3d 793, 799 (5th Cir. 2007) (citation and quotation marks omitted). “Domicile requires residence in [a] state and an intent to remain in the state.” *Id.* at 798 (citing *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)). Mr. Reed’s allegations relate to residency, rather than citizenship. In light of the record and Mr. Reed’s testimony at the September 12, 2018 bench trial, however, the court concludes he has adequately alleged and convinced the court that he is a citizen of Texas for diversity purposes, and was so at the time the lawsuit was initially filed and later removed.

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not the product of attorney error, they do not affect the court's analysis of its subject matter jurisdiction. Further, the court takes judicial notice
901 pursuant to Federal Rule of Evidence 201(b),⁵ that LKQ is a *901 Delaware corporation formed in 1998 with its North America headquarters in Chicago, Illinois. <http://www.sec.gov> (Form 10-K).

⁵ This rule allows the court to take judicial notice of facts that are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction or (2) capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998). Pursuant to Rule 201(b), the court takes judicial notice of LKQ's filings with the Securities and Exchange Commission indicating it is a Delaware corporation with its North America headquarters in Chicago, Illinois. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (taking judicial notice of documents required by law to be filed with Securities Exchange Commission).

III. Findings of Fact⁶

⁶ Insofar as any finding of fact constitutes a conclusion of law, it is adopted as a conclusion of law; and insofar as any conclusion of law made herein constitutes a fi



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http://www.lkqcorp.com/lkq-global_aboutus.⁷

⁷ Pursuant to Federal Rule of Evidence 201(b), the court takes judicial notice of this information from LKQ's company website. *See United States v. Flores*, 730 F. App'x 216, 219 n.1 (5th Cir. 2018) (Haynes, J., concurring) (internal citation omitted) (holding that "publicly available [information] on [a company's] official website" may be considered "an authoritative source" in certain contexts when the facts a court is taking notice of may be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); 2 McCormick on Evid. § 330, Facts Capable of Certain Verification (7th ed. 2016) ("Information obtained from online sources is becoming a frequently used basis for judicial notice. To this point, government and corporate websites and well-recognized mapping services are among the most commonly relied upon sources.") (footnotes omitted).

2. LKQ owns and operates a 71.5-acre automobile salvage yard (the "LKQ facility") at 2955 S. Burluson Boulevard, Burluson, Texas, at the corner of Interstate Highway 35W ("I-35W") and County Road 518 ("CR 518"). Pl.'s Ex. 1A; Jt. Pretrial Order 6 (Statement of Stipulated Facts) (Doc. 69). LKQ's business involves the retrieval of automotive parts from inoperable vehicles, the disassembly of parts, and the reconditioning of parts for wholesale distribution as after   's Ex. 4, at 3C-2.

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5. Mr. Reed owns a home and land located at 6825 CR 518 in Burleson, Texas, and has lived there since 2001, along with Mrs. Reed and their two sons. Tr. 19, lines 1-15; Tr. 125, lines 1-22; Pl.'s Ex. 1A. Along with his home, Mr. Reed's property includes a pool, a work shed, and a hay field. Tr. 23, lines 14-15; Tr. 24, lines 9-11, 19-21.

6. Mr. Reed's home and land are across from, and directly north, of the LKQ facility. Tr. 19, lines 19-20; Pl.'s Ex. 1A. Prior to LKQ's construction, the land across from his home was an open pasture with an agriculture zoning designation. Tr. 21, lines 17-20.

7. Mr. Reed's home sits on an upslope from both CR 518 and the LKQ facility. Tr. 22, lines 20-25; Pl.'s Ex. 1B.

8. Mr. Reed testified that the prevailing wind in the area of his property blows from south to north. Tr. 41, line 8. In addition to Mr. Reed's testimony at trial, pursuant to Federal Rule of Evidence 201(b), the court takes judicial notice that at Dallas/Fort Worth International Airport, which is approximately thirty miles from Burleson, Texas, the wind is most often from the south for 10 months, from February 8 to December 22, with a peak percentage of 70% from February 8 to December 22, with a peak percentage of 38% on months, from December 22 to February 8, with a peak percentage of 38% on

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less than one thousand feet from I-35W. Tr. 71, lines 14-15; Tr. 186, lines 4-12. A thick line of mature oak trees and a 10-foot metal fence, as well as buildings, separate Mr. Reed's home and I-35W. Tr. 71, lines 18-21.

10. Mr. Reed's property is bordered on the eastern side by a gas well, sometimes referred to as a natural gas well lift station. Tr. 21, lines 7-8; Pl.'s Ex. 1A. Mr. Reed believes the gas well operates twenty-four hours per day, although he is not certain, and has a surface made of white chat. Tr. 82, lines 15-22; Tr. 76, lines 1-10. Mr. Reed makes money from the gas well. Tr. 82, lines 23-25 to Tr. 83, lines 1-13.

11. The Reeds spend a significant amount of time outside, either around their pool, in the work shed, working the hay field, or entertaining friends. Tr. 24, lines 1-25 to Tr. 25, lines 1-10.

12. Mr. Reed enjoys spending time outdoors on his property, and that is the reason he purchased the land in 2001. Tr. 24, lines 1-4.

13. The Central Appraisal District of Johnson County, Texas, appraised the total market value of Mr. Reed's property in 2013 at \$179,652, and in 2017 at \$183,727. Tr. 114, lines 9-25; Tr. 115, lines 1-16; Def.'s Ex. 40.

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~~agricultural to industrial to enable the development of its automotive~~
reclamation and parts facility on 71.5 acres of land across from Mr. Reed's property. Pl.'s Ex. 16. Mr. Reed attended the public hearing and voiced his concerns and objections to the proposed zoning change. Tr. 25, lines 19-25 to Tr. 26, lines 1-15. Among other concerns, he explained that he and his family live across the road from the proposed zoning change and that changing the zoning from agricultural to industrial would cause issues with his home, including increased noise levels. Tr. 25, lines 2-25 to Tr. 26, lines 1-5.

15. On April 1, 2013, Mr. Reed attended a Burleson City Council meeting concerning LKQ's request for approval of a Specific Use Permit ("SUP") "for the purpose of constructing an approximate 107,138 square foot Auto Reclamation and Parts Distribution facility." Pl.'s Ex. 16. Mr. Reed attended the meeting and voiced his concerns about LKQ's request for an SUP. Tr. 28, lines 12-13.

16. Mr. Reed voiced his concerns and objections about the requested zoning change and SUP at multiple Burlington City Council meetings and Zoning and Planning Commission meetings that he attended in 2013, prior to construction. Tr. 25 - Tr. 28; Tr. 30, lines 14-16; Tr. 31, lines 4-16.

17. On May 20, 2013, Development prepared a memorandum for the Mayor and City Council

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including the following restrictions: (1) "The Open Salvage Yard component shall be used only for the storage and cataloging of reclaimed automotive parts and the sale and delivery to wholesale clients only"; (2) "No cutting, draining or part removal operations will occur within the Open Salvage Yard area"; and (3) "The Open Salvage Yard area shall be completely screened from all adjacent properties and public thoroughfares by a minimum 8 foot fence...with a ten foot wide buffer to be installed outside of said fence for tree and shrub planting." (the "Use Restrictions"). Pl.'s Ex. 2.

18. During the May 20, 2013 Burleson City Council meeting, Mr. Reed again voiced his concerns and was approached by several representatives of LKQ, including Messrs. Massey, Ottis Lee, and Tim Nelson, who told him that the LKQ facility was going to be a "nice facility," not a "junk yard," and "not noisy or dirty." Tr. 33, lines 1-8.

19. On May 20, 2013, the Burleson City Council adopted Ordinance C-737-13, authorizing the SUP and the Use Restrictions, and approved the zoning change from agricultural to industrial. Tr. 30, lines 7-11; Pl.'s Ex. 2.

C. Dust, Debris, Trash, and Noise During Construction of LKQ's Facility

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interchangeably. The court uses "dust" to refer to both, as dust includes the



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20. Construction of the LKQ facility began in the fall of 2013, and continued until approximately May or June of 2014. Tr. 64, lines 14-15; Tr. 40, lines 4-9.

21. Immediately after construction began, LKQ bulldozed all the trees screening Mr. Reed's property from the LKQ facility. Tr. 35, lines 6-12. In preparing the site, LKQ dragged and scraped the land. Mr. Reed testified that "dirt was kicking up into the air. It was unreal. It was getting as high as the clouds." Tr. 35, lines 22-24. The process of bulldozing the trees and dragging and scraping the land took approximately two months. Tr. 35, lines 8-9.

22. Once construction began, the Reeds frequently found their home, windows, patio, patio furniture, outdoor grill, and vegetation covered with a thick layer of dust. Tr. 36, lines 23-24; Tr. 41, line 8. Mr. Reed testified, "I had trash and debris blowing all over my property, and I had tons of styrofoam blowing onto my property." Tr. 36, lines 24-25 to Tr. 37, line 1. Photographs taken by Mr. Reed during construction show a copious amount of dust and styrofoam debris on his property. Pl.'s Exs. 17-F through 17-V.

23. Mr. Reed testified that styrofoam shavings and dust from LKQ filled his pool and blocked the diatomaceous earth ("DE") filters. Tr. 37, lines 1-18.

Although he previously  Download PDF  Check Treatment because of the amount of dust generated by the construction, he was required to clean

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to clean them again. Tr. 39, lines 3-16.

24. Mr. Reed testified that on one particular Saturday during construction, the back-up beeper on a truck at LKQ's facility was going off all night, even after the facility was closed. Tr. 43-44. He testified that he and his wife attempted to reach someone from LKQ regarding the noise but could not and, ultimately, they were forced to call the City of Burleson Police Department at 2:00 a.m., after which the back-up beeper finally ceased. Tr. 44, lines 5-7.

25. Mr. Reed testified that during construction, LKQ used floodlights at night that "lit up" his home. Tr. 42, lines 9-14.

26. Mr. Reed raised concerns about LKQ bulldozing all the trees screening his property from the LKQ facility, as well as about the dust and debris caused by LKQ's construction, with both LKQ and the City of Burleson. Tr. 38, lines 15-16; Tr. 42, lines 1-6.

27. Mr. Reed testified that during construction, LKQ made "no attempt to try to stop the dust from coming up. They just kept going about their business of what they were trying to accomplish." Tr. 42, lines 13-16.

28. Mr. and Mrs. Reed testified that during construction, the Reeds had no problems with dust or debris on their

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30. During the construction phase, in addition to complaining about the dust and debris, Mr. Reed complained to LKQ about the "back-up beepers that [were] on their vehicles that [were] constantly beeping." Tr. 42, lines 6-8.

D. Amendments to the SUP and Communications with Mr. Massey

31. On May 4, 2014, Mr. Reed attended a City Council meeting convened to consider LKQ's request for amendments to the SUP, at which he again voiced his objections and complained about the dust, debris, and noise caused by the construction. Tr. 44, lines 8-15; Tr. 45, lines 13-17. He also expressed concern about LKQ's removal of trees along CR 518 and the lack of screening between his property and the LKQ facility. Pl.'s Ex. 3.

32. On May 9, 2014, Mr. Massey sent an e-mail to Plaintiff stating: "Please accept my sincere apologies for any inconveniences you might have experienced since our construction began. Developing a facility of this size is a major undertaking and will often create nuisances for surrounding properties. We would like to resolve these items that you may have experienced as a result of our construction." Pl.'s Ex. 25

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hay, and trash in the yard, stating, "While the issues are directly related to construction, we certainly understand that it is our responsibility as [a] good citizen and neighbor to resolve these items." Pl.'s Ex. 25.

34. Mr. Reed rejected Mr. Massey's offer to plant trees because he was concerned that he would not be able to bale hay in his hay field if leaves and foliage *905 from the trees fell into the hay. Tr. 47, lines 16-18.

35. LKQ offered to help pay Mr. Reed for inconveniences and damage caused by construction. Tr. 90, lines 4-6, Tr. 95, lines 19-24. Messrs. Massey and Reed had a telephone conversation concerning the impact of the construction on his property. LKQ's offer in the amount of \$2,775 included the cost of cleaning the pool's DE filter for ten months, cleaning the pool for ten months, power washing air condition units (which Mr. Reed testified took him five hours), and the cost to replace 200 bales of hay. Tr. 175, lines 17-25 to Tr. 176, lines 1-16; Def.'s Ex. 19. Mr. Massey testified, "I felt like we had an agreement over the phone." Tr. 157, line 25. He testified he left a message for Mr. Reed that a check was available for him to pick up from the contractor. Tr. 176, line 22. He testified that Mr. Reed did not pick up the payment, and the check was never cashed. Tr. 176, line 25. LKQ has not provided evidence that Mr. Reed received the message regarding the check. Other than Mr. Massey's testimony that he reached an agreement over the telephone, there is no evidence that Mr. Reed agreed

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screened from adjacent properties, as contained in the Use Restrictions, *supra*, was amended, with the word "completely" removed. Def.'s Ex. 10. The amended SUP retained the requirement that "The Open Salvage Yard component shall be used only for the storage and cataloging of reclaimed automotive parts and the sale and delivery to wholesale clients only." Def.'s Ex. 10.

E. Dust, Debris, Trash, and Noise During Operation of LKQ's Facility

37. The Open Salvage Yard at the LKQ facility operates normally from 7:00 a.m. to 6:00 p.m. on all days except Sunday. Tr. 68, lines 5-8; Tr. 171, lines 23-25. The warehouse is open until 2:00 a.m., and inside the warehouse the trucks are loaded. Tr. 172, lines 8-10.

38. The surface of the Open Salvage Yard at the LKQ facility is caliche, also called white chat. Tr. 62, line 25; Tr. 63, lines 1-3. Until June 2017, when LKQ began regularly watering the surface with water trucks, absent rain, the caliche surface was a continuing source of dust on Mr. Reed's property, as vehicles traveled on the caliche surface to and from the LKQ facility, creating clouds of dust on Mr. Reed's property by the prevailing winds. Tr. 63, lines 1-3.



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IMG 4747).

40. Because of the dust blowing from the caliche surface onto his property, Mr. Reed testified that he had to pressure wash his house, windows, air conditioner unit, and aerobic waste system filter more often than prior to LKQ's arrival. Tr. 58, lines 1-17.

41. There are alternative sources of dust in the vicinity of Mr. Reed's
906 property. Mr. Massey testified that dust was also *906 produced by
construction at a site just south of LKQ, at which an industrial park was
being built. Tr. 187, lines 9-25 to Tr. 188, lines 1-21. He testified that
construction had been taking place there for more than one year, but less
than two years, prior to the date of trial. Tr. 188, lines 20-21. A videotape
taken by LKQ in January 2018 shows a minimal amount of dust being
produced by the development south of LKQ and blowing onto LKQ's
property, not Mr. Reed's. Def.'s Ex. 25. Mr. Reed, on cross-examination, did
not dispute that, beginning "about a year give or take" prior to trial and
continuing to the time of trial, construction had been taking place at a site
south of LKQ. Tr. 104, lines 2-14. He testified, however, that based on his
personal observations, he saw the dust about which he was complaining
coming off the Open Salvage Yard at the LKQ facility and felt the wind
blowing dust from it. Tr. 106, line
1. He also testified that he believed the surface at the construction site south

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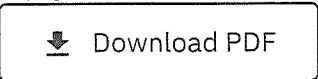

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of the car crusher, he testified that when it was up by his property, the noise produced was constant: "They are loading cars in there all day long, crushing cars, crushing cars, crushing cars, all day long." Tr. 73, lines 11-13. He also testified that when the car crusher was moved away from his property to the back corner of LKQ's property, he could not hear the sound of actual car crushing, but only the hum of the motor which produced a "high-pitched" sound. Tr. 69, lines 19-23.

48. He testified that the noise from the car crusher, back-up beepers, and metal dragging could be heard inside his home and was loud enough to wake him from sleep. Tr. 68-70.

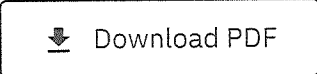

49. Mr. Reed testified that, on one occasion, the noise level of the back-up beepers prevented his son from studying at home, and his son was required 907 to leave *907 the home to study elsewhere. Tr. 73, lines 2-3.

50. Mrs. Reed testified that she no longer sets an alarm clock because the back-up beepers wake her up, and the noise of the back-up beepers, which she can hear inside her home, "is sunup to sundown." Tr. 129, lines 4-11. She further testified that the noise from back-up beepers was constant to the point she has "literally gone a little mad sometimes," and while at the grocery store, she h  nt  ar." Tr. 129, lines 17-22.

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noise from LKQ's operations was persistent and loud enough to hear from that point of Mr. Reed's property farthest from the LKQ facility. The noise audible on the videotapes includes the back-up beepers of LKQ's vehicles and the sound of the car crusher when it is positioned near Mr. Reed's property line. Pl.'s Ex. 21 (IMG 4747; IMG 4748; IMG 4762; IMG 4763; IMG 4764). Although the sound of dragging vehicles is not audible in the videotapes, videotape taken by Plaintiff on his cellular telephone shows an LKQ vehicle pushing or carrying an automobile across the Open Salvage Yard toward the car crusher. Pl.'s Ex. 21 (IMG 4762). Further, Mr. and Mrs. Reed provided credible and consistent testimony of the sound produced by dragging metal. Tr. 68-70; Tr. 73; Tr. 130, lines 1-2.

53. Videotapes taken by Defendant in January 2018 reflect that noise from I-35W is audible on Mr. Reed's property. Def.'s Ex. 26; Def.'s Ex. 27. Mr. Massey also testified that, when standing on Mr. Reed's property, he is able to hear the sound of I-35. Tr. 186, line 1.

54. Mr. Reed testified that the compressor at the gas well to his east has a sound barrier, and it only produces a light humming sound that does not disturb him. Tr. 71, lines 2-13. Videotapes taken by Plaintiff on his cellular telephone between  e C  . Reed's testimony. The sound of the gas well is not audible on the videotapes taken

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questioning by the court, Mr. Massey acknowledged that when he took the videotape, he was "standing on the gas site driveway," approximately "150 feet" from the gas wells, and approximately 500 feet from Mr. Reed's home. Tr. 192, lines 17-19; Tr. 193, lines 3-8.

56. Mr. Massey testified that, following the commencement of operations, LKQ took steps to abate any intrusion that it may have on Mr. Reed's enjoyment of his property. Tr. 173, lines 17-19. These included measuring the noise after receiving noise complaints to ensure compliance (Tr. 173, lines 20-24); watering down the roads used by vehicles several times per day beginning June 26, 2017 (Tr. 200, lines 19-25 and Def.'s Ex. 32); hooding its lights on the side of Mr. Reed's property (Tr. 110, lines 7-13); and moving operations, including the car crusher, away from Mr. Reed's property line, and designating the lane that is the farthest away from his property line as the main drive, directing the majority of its traffic to that lane. Tr. 109, line 908 *908 25 to Tr. 110, lines 1-6 and Tr. 174, lines 1-15. Mr. Massey testified that LKQ has had no dust complaints since it began watering down of the roads in June 2017. Tr. 201, lines 7-10; Def.'s Ex. 32.

57. Pursuant to the SUP, as amended, the only activities allowed in the Open Salvage Yard were s



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parts and

cutting and/or removing of parts. Def.'s Ex. 10. The evidence introduced at

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Mr. Reed's property. Tr. 178-180. He also testified that some of the trees died because of a damaged water line on LKQ's property, and that LKQ has been engaged in re-planting the trees that had died. Tr. 165, lines 1-8; Tr. 174, lines 16-25 to Tr. 175, line 10. Mr. Massey testified that he believes the Open Salvage Yard was screened from Mr. Reed's property. Tr. 166, lines 24-25 to Tr. 167, lines 1-2.

59. Mr. Reed testified that trees and shrubs planted by LKQ did not screen his property from the LKQ facility and did not meet the requirements of the SUP's landscape buffer plan, which required a ten-foot wide landscape buffer to be installed outside of the screening fence. Tr. 68, line 14; Pl.'s Ex. 20; Pl.'s Ex. 4. Photographs taken by Plaintiff after construction, as well as videotapes taken both by Plaintiff and Defendant, support Mr. Reed's testimony that the trees and shrubs planted by LKQ, many of which died due to LKQ's failure to provide adequate irrigation, did not screen Mr. Reed's property from the LKQ facility, and that the tree and shrub plantings were skimpy. Def.'s Ex. 44; Def.'s Ex. 24; Pl.'s Exs. 17-AA, DD, JJ, KK, MM, NN, OO, QQ, SS; Pl.'s Ex. 21. These same photographs and videotapes contradict Mr. Massey's testimony that the Open Salvage Yard was screened from Mr. Reed's property. Tr. 166, lines 24-25 to Tr. 167, lines 1-2.

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buffer which was approved by the City in the original SUP [] [and] included the planting of trees which would grow to sufficient height to provide screening for adjacent properties.” Pl.’s Ex. 9 (LKQ 000059).

61. Although Mr. Reed asked LKQ to build a thirty-foot fence between its facility and his property, and the City Council did not believe an eight-foot fence could completely screen LKQ’s facility from Mr. Reed’s property, LKQ chose not to build a fence higher than the minimum eight-foot fence required by the SUP. Tr. 152, lines 15-25 to Tr. 156, line 16.

62. Mr. Reed has not sought any medical treatment or psychological or emotional counseling for any of the issues related to his claims. Tr. 119, line 24-25 to Tr. 120, line 4.

63. Mr. Reed testified that LKQ’s operations were a burden on him and his family. Tr. 72, lines 5-6.

64. Mrs. Reed testified that the noise and dust from the LKQ facility have affected the use of enjoyment of her home and property and, were her children one and five today, she would not have bought the house. Tr. 131, 909 lines 10-18.*909 65. Mr. Reed testified that LKQ’s operations have affected his use of enjoyment of swimming pool because [] it out by his swimming pool and you are hearing this horrifying metal sound being dragged across the

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country. Tr. 126, lines 1-2.

F. The Credibility of the Witnesses

67. In assessing the testimony of Mr. Reed, Mrs. Reed, and Mr. Massey, the court has considered each witness's demeanor and manner of testifying while on the witness stand; apparent candor and fairness, or the lack thereof; the reasonableness or unreasonableness of each witness's testimony; the opportunity he or she had to observe or acquire knowledge concerning the facts to which he or she testified; the extent to which he or she was contradicted or supported by other credible evidence; and whether such contradiction related to an important factor in the case or some minor or unimportant detail. *See supra* note 2.

68. Having considered the above-listed factors, the court determines that the testimony of Plaintiff and his wife, Mrs. Reed, was more credible than that of Mr. Massey, the sole witness appearing on behalf of LKQ as its corporate representative. First, Mr. Massey testified he is the plant manager at four LKQ facilities in the Dallas-Fort Worth area. Tr. 139, lines 23-24. Although no objection was made to him appearing as a witness for LKQ, common sense compels the court to conclude that Mr. Massey was not present at the site during all relevant time periods of construction and operation. Accordingly,

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contradicted by the photographic and videotape evidence admitted at trial, as well as Mr. Reed's testimony. Def.'s Ex. 44; Def.'s Ex. 24; Pl.'s Exs. 17-AA, DD, JJ, KK, MM, NN, OO, QQ, SS; Pl.'s Ex. 21; Tr. 68, line 14.

69. Additionally, several times during the trial, Mr. Massey appeared hesitant and evasive in his responses, requiring the court to instruct him to answer questions directly. At one juncture, after an extensive colloquy between Mr. Bobo and Mr. Massey, the court was required to interject and admonish Mr. Massey: "Okay, let me just say this. If a question is asked, answer [Mr. Bobo's] question. Do not try to reroute the answer to what you think it should be." Tr. 146, lines 1-3. On another occasion, after observing that Mr. Massey gave inconsistent and unclear responses regarding whether certain trees located between the LKQ facility and Mr. Reed's property appearing in a photograph taken by Plaintiff preexisted LKQ's construction or were planted by LKQ, the court, in response to Mr. Massey's statement that he thought it had been established previously that certain trees were preexisting, stated:

No, we have not. We have not established that because you are running around the barn [five] or [six] times, and you have not come in. Go ahead and cut to the chase, so I know what is going on

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Tr. 163, lines 4-13.

70. The testimony of Plaintiff and his wife, Mrs. Reed, was consistent throughout the trial. Plaintiff and his wife did not exhibit any evasiveness, and each clearly had personal knowledge of the events that transpired between 2013 and the date of trial.

IV. Conclusions of Law

A. Applicable Nuisance Law

As stated by the late Dean William L. Prosser, “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.” W. Page Keeton et al., *Prosser and Keeton on Law of Torts* § 86, at 616 (5th ed. 1984) (“Prosser and Keeton”) (footnotes omitted). “Courts have used it to identify the cause or source of harm, the harm suffered, and the resulting liability.” *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 587 (Tex. 2016) (citing Restatement (Second) of Torts § 821A cmt. b (Am. Law Inst. 1979)). “The state of the nuisance doctrine some severe” *Download PDF* *Check Treatment* nuisance as the law’s ‘garbage can.’” *Id.* (quoting William L. Prosser, *Nuisance Without*

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partly, from a failure to clearly define what constitutes a nuisance; and, partly, from differences in describing the kinds of conduct required to support a nuisance claim. Prosser and Keeton § 86, at 617. Agreeing with Dean Prosser's lament that the lack of clear delineation of the circumstances in which the law imposes liability against one who creates a nuisance can lead to confusion, the Supreme Court of Texas in *Crosstex* attempted "to provide a more comprehensive, though certainly not exhaustive, explanation of the circumstances in which Texas law may hold a party liable for causing a private nuisance." 505 S.W.3d at 591.

Crosstex explained that the law of "nuisance" seeks to balance a property owner's right to use his property "as he chooses in any lawful way" against his duty not to use it in a way that injures another. *Id.* at 590-91 (citation omitted). It defined "nuisance" as "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." *Id.* at 593 (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003)).

According to *Crosstex*, a nuisance does not refer to a cause of action "but instead to the particular injury or cause of action seeking legal relief." *Id.* at 594 (emphasis in original). The law of

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example, cause physical damage to the plaintiffs' property, economic harm to the property's market value, harm to the plaintiffs' health, or psychological harm to the plaintiffs' 'peace of mind' in the use and enjoyment of their property." *Id.* at 596.

To rise to the level of nuisance, however, the interference must satisfy two additional requirements. First, it must be "substantial" in light of all the circumstances. *Id.* at 595. Second, the "discomfort or annoyance" must be objectively "unreasonable." *Id.*

The requirement that the interference must be "substantial" "sets a minimum threshold that confirms that the law does not concern itself with trifles, or seek to remedy all of the petty annoyances and disturbances of every day life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result." *Id.* at 595 (internal quotation marks and citation omitted). According to *Crosstex*, "There is no question that foul odors, dust, noise, and bright lights—if sufficiently extreme —may constitute a nuisance." *Id.* at 595 n.8 (quoting *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004) (emphasis supplied by *Crosstex*)). In determining whether the interference is substantial, a court may review whether the use impairs the adjoining property's market value.

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without compensation." *Id.* at 596 (citation omitted). In *Crosstex*, the court noted that the unreasonableness inquiry focuses on the effect of the conduct, not the conduct itself. *Id.* at 596-99. It also emphasized that the test is an objective one that views the effect from the standpoint of a "person of ordinary sensibilities," *id.* at 596, 599-600. Otherwise stated, to constitute a private nuisance, the effects of a defendant's conduct or land use must be "such as would disturb and annoy persons of ordinary sensibilities, and of ordinary tastes and habits." *Id.* at 599. "It is not enough that plaintiff himself is offended or annoyed if he is peculiarly sensitive." *Id.* at 600. "The standard is what ordinary people, acting reasonably, have a right to demand in the way of health and comfort under all the circumstances." *Id.*

Further, "as is typical with legal inquiries into reasonableness," the court noted that "the determination requires balancing a wide variety of factors, depending on the specific facts." *Id.* at 596. These include:

– the character and nature of the neighborhood, each party's land usage, and social expectations;

– the location of the property and its use; and the character of the neighborhood; and the character of the neighborhood; and the character of the neighborhood;

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- the tendency or likelihood that the defendant's conduct will cause interference with the plaintiff's use and enjoyment of their land;
- the magnitude, extent, degree, frequency, or duration of the interference and resulting harm;

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- the relative capacity of each party to bear the burden of ceasing or mitigating the usage of their land;
- the timing of each party's conduct or usage that creates the conflict;
- the defendant's motive in causing the interference; and
- the interests of the community and the public at large.

Id. at 600 (citations omitted) (the "Crosstex factors"). "Whether an interference is substantial or the effects of the interference unreasonable in any given case necessarily depends on these and potentially other factors."

Id. All of these factors



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construction that altered the flow of a nearby creek, *see, e.g., Barnes v. Mathis*, 353 S.W.3d 760, 763-64 (Tex. 2011); emitting noxious odors that permeated the plaintiff's land, *see, e.g., Natural Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 154 (Tex. 2012); discharging water onto the plaintiff's land, *see, e.g., Tennessee Gas Transmission Co. v. Fromme*, 153 Tex. 352, 269 S.W.2d 336, 338 (Tex. 1954); or invading the plaintiff's land with dust, noise, or bright lights, *see, e.g., Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269-70 (Tex. 2004); *Justiss*, 397 S.W.3d at 154.




Finally, *Crosstex* set forth three classifications for private nuisance: intentional nuisance, negligent nuisance, and strict-liability nuisance. *Id.* at 602, 604-609. The court first addresses the standard for intentional nuisance followed by negligent nuisance. The court previously entered judgment as a matter of law in LKQ's favor on Plaintiff's strict liability nuisance claim. *See* Mem. Op. & Order (Doc. 44).

For an intentional nuisance claim, a plaintiff may establish intent with proof that the defendant acted with a specific intent to inflict injury or a malicious desire to so harm by causing the actionable interference. *Crosstex*, 505 S.W.3d at 605. "But an intent to inflict injury or desire to harm is not required to show intent; the plaintiff can establish intent with evidence that the defendant acted  Download PDF *he*  Check Treatment substantially certain to result from the defendant's conduct." *Id.* (quoting *Reed Tool Co. v.*

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harm for its own sake; but more often the situation involving a private nuisance is one where the invasion is intentional *merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow*. Thus, a defendant who continues to spray chemicals into the air after he is notified that they are blown onto the plaintiff's land is to be regarded as intending that result, and the same is true when he knows that he is contaminating the plaintiff's water supply with his slag refuse, or that blown sand from the land he is improving is ruining the paint on the plaintiff's house. If the interference is unreasonable, it is tortious and subjects him to liability.

Prosser and Keeton § 86, at 624-25 (emphasis added).

913 A plaintiff's negligent nuisance claim is governed by ordinary negligence^{*913} principles, and a plaintiff must prove "the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *Crosstex*, 505 S.W.3d at 607 (internal quotation marks omitted). A negligent nuisance may result from "a failure to take precautions against a risk apparent to a reasonable man." *Id.*  Download PDF  Check Treatment  A duty exists is a threshold inquiry and a question of law; liability cannot be

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avoid injury or damage to the property of others.”) (citation omitted). When breach of that duty substantially interferes with use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities, it has caused a nuisance. *Id.* at 600.


B. Conclusions Regarding Liability

1. Mr. Reed’s Intentional Nuisance Claim Based on Dust and Debris

The court makes the following conclusions of law concerning Mr. Reed’s intentional nuisance claims based on dust and debris from the LKQ facility.

Mr. Massey admitted or acknowledged in a May 9, 2014 e-mail sent to Mr. Reed that LKQ’s construction created a “nuisance[] for surrounding properties,” and that issues about which Mr. Reed complained—including the dust and debris on his property, in the pool, in the air conditioner units, and destruction of bales of hay—were “directly related to construction[.]” Pl.’s Ex. 25. Mr. Massey’s admission is binding on LKQ, as Mr. Massey was LKQ’s corporate representative and spoke on behalf of LKQ in his May 9, 2014 e-mail. See *Johnson v. Big Lots Stores, Inc.*, 2008 WL 6928161, at *2 (E.D. La. May 2, 2008) (“[]”).

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representative,” the only evidence adduced at trial was Mr. Massey’s conflicting testimony that he did not have an opinion as to whether the conditions created by LKQ during construction constituted a nuisance. Tr. 140, line 25. In any event, even if Mr. Massey’s statement is not an admission of a party opponent, the statement is one that the court may consider in assessing the credibility of a witness.

In addition to Mr. Massey’s acknowledgment in his May 9, 2014 e-mail that LKQ’s construction created a nuisance affecting surrounding properties, for the reasons that follow, the court concludes that Mr. Reed has shown by a preponderance of the evidence that LKQ’s construction and operation created dust and debris that substantially interfered with his use and enjoyment of his land by causing him unreasonable discomfort or annoyance.*914 Mr. Reed has proved by a preponderance of the evidence that, beginning with construction in the fall of 2013, and continuing until it began watering down the caliche surfaces of the Open Salvage Yard on or about June 26, 2017, dust caused by LKQ’s construction and operations blew onto his property. With respect to debris, Mr. Reed has proved by a preponderance of the evidence that, beginning with construction in the fall of 2013, and continuing until construction ended in approximately May of 2014, debris caused

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The evidence includes, without limitation, the following.

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Tr. 35, lines 22-24. Mr. Reed testified, “I had trash and debris blowing all over my property, and I had tons of styrofoam blowing onto my property.” Tr. 36, lines 24-25 to Tr. 37, line 1.¹⁰ Mr. Reed also testified that the prevailing wind in the area of his property blows from south to north. Tr. 41, line 8. In addition to Mr. Reed’s testimony at trial, pursuant to Federal Rule of Evidence 201(b), the court took judicial notice that the prevailing wind in the area was south to north. *See* Finding of Fact No. 8. Mr. Reed’s property is north of the LKQ facility. Tr. 19, lines 19-20; Pl.’s Ex. 1A. From this evidence, the court concludes that the dust and debris generated by LKQ’s construction blew from the LKQ facility onto Mr. Reed’s property.

¹⁰ Although Mr. Reed uses the word “tons” in describing the amount of styrofoam, the court does not take this to mean that he literally had thousands and thousands of pounds of styrofoam. The court interprets this to mean that there was a significant amount to cause him discomfort or annoyance.

Following completion of construction, from approximately May 2014 until on or about June 26, 2017—when LKQ began regularly watering down the caliche road surfaces in the Open Salvage Yard (Def.’s Ex. 32)—Mr. Reed testified that LKQ’s operations were a constant source of dust blown onto his property by the  Download PDF 53,  Check Treatment Salvage Yard at the LKQ facility operates normally from 7:00 a.m. to 6:00 p.m on all

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that LKQ's operations produced large clouds of dust which, given the prevailing winds, accumulated on his property. Pl.'s Ex. 17-BB, DD, FF.

Mr. Reed has proved by a preponderance of the evidence that the nature, duration, and amount of dust and debris on his property from LKQ's construction and operation substantially interfered with his use and enjoyment of his property for its intended purpose by causing unreasonable discomfort and annoyance. As set forth directly above, the evidence shows that the dust and debris from LKQ's construction and operation began in the fall of 2013 and continued for approximately four years, until approximately June 26, 2017, when water logs show that LKQ began regularly watering down the caliche surfaces. *See* Def.'s Ex. 32. With respect to the amount of dust, since the construction began, Mr. Reed testified that his home, windows, patio, patio furniture, outdoor grill, and vegetation were frequently covered with a thick layer of dust. Tr. 36, lines 23-24; Tr. 41, line 8. Mr. Reed testified that styrofoam shavings and dust from LKQ filled his pool and blocked the DE filters during LKQ's construction. Tr. 37, lines 1-18.

915 Although he previously cleaned the pool's DE filters *915 twice yearly, because of the sheer amount of dust generated by the construction, he was required to clean them much more often than previously, and he was required to clean them [Download PDF](#) [Check Treatment](#) , lines 4-11. Mr. Reed testified that a week after he cleaned the DE filters, he looked like a

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conditioner unit, and aerobic waste system more often than previously. Tr. 58, lines 1-17. Mrs. Reed testified that during the construction phase, so much debris was blowing from LKQ's property onto the Reed's property that "it was like snowing styrofoam." Tr. 128, line 6. Photographic and videotape evidence cited directly above corroborates Mr. and Mrs. Reed's testimony and shows that the dust and debris generated by LKQ's construction and operation that blew onto Mr. Reed's property was substantial and of long duration. Pl.'s Ex. 21 (IMG 4766; IMG 4747); Pl.'s Ex. 17-BB, DD, FF.

While Mr. Massey testified that others in the vicinity of Mr. Reed's home may have engaged in activities that also produced dust, and Mr. Reed conceded that some of the dust on his property may have come from others, based on Mr. Reed's testimony, Mrs. Reed's testimony, Mr. Massey's acknowledgment in his May 9, 2014 e-mail to Mr. Reed that LKQ caused the dust and debris (Pl.'s Ex. 25), photographs and videotapes, and the direction of the prevailing winds blowing from LKQ's facility toward Mr. Reed's property, *supra*, the court concludes that any dust generated by others in the vicinity of Mr. Reed's property was not a significant cause of dust on Mr. Reed's property. In addition, Mr. and Mrs. Reed both testified that prior to LKQ commencing construction, they had no problems with dust or debris on their property. T



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25.

Mr. Reed has proved by a preponderance of the evidence that LKQ, having notice of the dust and debris blowing onto his property, created or continued to generate the dust and debris with knowledge that the harm to Mr. Reed’s interests was occurring or substantially certain to result from the construction and operation of its facility. Until LKQ began regularly watering down the caliche surfaces in the Open Salvage Yard on or about June 26, 2017, *see* Def.’s Ex. 32, the evidence detailed above shows that the dust from its operations continued to blow onto Mr. Reed’s property. Mr. Reed also testified that during construction, LKQ made “no attempt to try to stop the dust from coming up. They just kept going about their business of what they were trying to accomplish.” Tr. 42, lines 13-16.

Mr. Reed has proved by a preponderance of the evidence that the effects of LKQ’s substantial interference with his use and enjoyment of his property caused by dust and debris were unreasonable. From the evidence set forth in detail above, the court concludes that the harm resulting from the dust and debris “is severe and greater than the other should be required to bear
916 without compensation.” *916 *Crosstex*, 505 S.W.3d at 596 (citation omitted).
In reaching this conclusion, the court has considered evidence pertaining to the *Crosstex* factors, including the nature of LKQ’s interference with Mr. Reed’s

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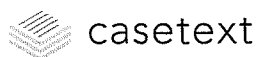
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changed from “agricultural” to “industrial” to enable the development of LKQ’s automobile reclamation facility, and an SUP was granted to allow LKQ to operate. Pl.’s Ex. 2; Pl.’s Ex. 16. While there are other commercial entities that have sprung up in the vicinity of Mr. Reed’s home since he purchased it in 2001, there is no evidence of any business enterprise that is of the same scope or type as LKQ’s. Further, with regard to the relative capacity of each party to bear the burden of ceasing or mitigating the usage of its land, the evidence before the court shows that LKQ is a multinational corporation and has the resources to create barriers to eliminate or significantly lessen the nuisances of which Mr. Reed complains, while Mr. Reed does not have the capacity to fix or eliminate the problem, absent selling his property and moving. Additionally, LKQ’s motive in causing the interference is financial gain. Further, the social utility of an automobile reclamation facility (especially given that three other such facilities are located in the Dallas-Fort Worth area) does not vitiate the long-revered right to the use and enjoyment of one’s home.

Moreover, the court concludes that LKQ’s possession of an SUP does not insulate it from liability for nuisance. “Even if a commercial enterprise holds a valid permit to conduct a particular business, the manner in which it performs its activities” *Carlton Indus., Ltd. v. Blanchard*, 56 F. Supp. 3d 892, 898 (D. Tex. 2010), no

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relief or damages.”).

For these reasons, the court concludes that Mr. Reed has proved by a preponderance of the evidence all of the necessary elements of his intentional nuisance claim based on dust and debris from LKQ’s construction and operation. Accordingly, he is entitled to damages.

2. Intentional Nuisance Claim Based on Trash and Floodlights from LKQ’s Facility

The court makes the following conclusions of law concerning Mr. Reed’s intentional nuisance claim arising from trash from LKQ’s facility.

Mr. Reed has proved by a preponderance of the evidence that some trash from LKQ’s construction and operation accumulated on his property; however, he cannot affirmatively identify the source of most of the trash on his property other than through speculation. Tr. 116, lines 1-25 to Tr. 118, lines 1-8. In his testimony, Mr. Reed can only identify one piece of trash specifically that is related to LKQ, and trash on his property may appear as infrequently as one time per week. Tr. 59, line 12; Tr. 61, line 7. Mr. Reed testified that for a period of one or two nights during construction, LKQ

917 used floodlights that
failed to prove by a

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Crosstex, 505 S.W.3d at 595 (internal quotation marks and citation omitted).

Accordingly, Mr. Reed has failed to prove by a preponderance of the evidence all necessary elements of an intentional nuisance claim based on trash and floodlights from LKQ.

3. Intentional Nuisance Claim Based on Noise from LKQ's Facility

The court makes the following conclusions of law concerning Mr. Reed's intentional nuisance claim based on noise from LKQ's facility.

Mr. Reed has proved by a preponderance of the evidence that noise from LKQ's construction and operation reached his property, and that the nature, duration, and amount of noise from LKQ's construction and operation substantially interfered with his use and enjoyment of his property for its intended purpose by causing unreasonable discomfort and annoyance. The evidence supporting this conclusion includes the following:

Mr. Reed testified that LKQ's operations produced constant noise "every day all day from the moment they open until the time they close in the evening."

Tr. 61, lines 18-29. He testified that the constant noise was coming from

three main sources:  by  er (which was situated in close proximity to his property and for periods of six to eight

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respect to the noise of the car crusher, he testified that when it was up by his property, the noise produced was constant: "They are loading cars in there all day long, crushing cars, crushing cars, crushing cars, all day long." Tr. 73, lines 11-13. He also testified that when the car crusher was moved away from his property to the back corner of LKQ's property, he could not hear the sound of actual car crushing, but only the hum of the motor which produced a "high-pitched" sound. Tr. 69, lines 19-23.



Mr. Reed also testified that the noise from the car crusher, back-up beepers, and metal dragging could be heard inside his home and was loud enough to wake him from sleep. Tr. 68-70. He testified that, on one occasion, the noise level of the back-up beepers prevented his son from studying at home, and his son was required to leave the home to study elsewhere. Tr. 73, lines 2-3. He also testified to an instance during which the back-up beepers malfunctioned and continued throughout the entire night. Tr. 43-44.

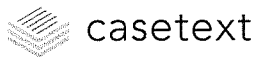
Mrs. Reed's testimony is consistent with Mr. Reed's. She testified that she no longer sets an alarm clock because the back-up beepers wake her up, and the noise of the back-up beepers, which she can hear inside her home, "is sunup to sundown." Tr. 129, lines 4-11. She further testified that the noise from back-up beepers was constant to the point she has "literally gone a little mad sometime" for "experienced" a phantom beeping in [her] ear." Tr. 129, lines 17-22. Mrs. Reed also testified

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that point of Mr. Reed's property farthest from the LKQ facility. The noise audible on the videotapes includes the back-up beepers of LKQ's vehicles and the sound of the car crusher when it is positioned near Mr. Reed's property line. Pl.'s Ex. 21 (IMG 4747; IMG 4748; IMG 4762; IMG 4763; IMG 4764). Although the sound of dragging vehicles is not audible in the videotapes, videotape taken by Plaintiff on his cellular telephone shows an LKQ vehicle pushing or carrying an automobile across the Open Salvage Yard toward the car crusher. Pl.'s Ex. 21 (IMG 4762). Further, Mr. and Mrs. Reed provided credible and consistent testimony of the sound produced by dragging metal. Tr. 68-70; Tr. 73; Tr. 130, lines 1-2.

While LKQ produced some evidence that noise on Mr. Reed's property was caused by nearby roads and other activities in the vicinity of Mr. Reed's home, based on Mr. Reed's testimony, Mrs. Reed's testimony, Mr. Massey's testimony, videotapes, and the direction of the prevailing winds blowing from LKQ's facility toward Mr. Reed's property, *see supra*, the court concludes that, with the exception of the sound of I-35W and the gas well, which Mr. Reed testified did not disturb him, the primary source of noise audible on Mr. Reed's property and in his home emanated from LKQ's operations in the Open Salvage Yard, including the constant sound of back-up beepers during h  Download PDF e s  Check Treatment er, and the sound of scraping metal. See Finding of Fact No. 55.



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the noise. Pl.'s Ex. 21 (IMG 4747; IMG 4748; IMG 4762; IMG 4763; IMG 4764);Tr. 68-70; Tr. 73; Tr. 130, lines 1-2. In addition, pursuant to the SUP, as amended, the only activities allowed in the Open Salvage Yard were storing and cataloging reclaimed automotive parts and cutting and/or removing of parts. Def.'s Ex. 10. The evidence introduced at trial shows that, despite the limitations in the amended SUP, LKQ dragged metal and operated a car crusher in the Open Salvage Yard from the commencement of operations in the summer of 2014 to the date of trial. Tr. 68, lines 22-25 to Tr. 69, lines 1-24; Tr. 73, lines 9-13; Tr. 130, lines 1-2; Pl.'s Ex. 21.

Mr. Reed has proved by a preponderance of the evidence that the effects of LKQ's substantial interference with his use and enjoyment of his property caused by noise were unreasonable. From the evidence set forth in detail above, the court concludes that the harm resulting from the noise "is severe and greater than the other should be required to bear without compensation." *Crosstex* , 505 S.W.3d at 596 (citation omitted). In reaching this conclusion, the court has considered evidence pertaining to the *Crosstex* factors. The court has already examined numerous *Crosstex* factors, including the nature of LKQ's interference with Mr. Reed's property, and the magnitude, extent, degree, frequency and duration of the noise. With respect to the chara

919 that the land was originally zoned agricultural, and 919 the property across

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evidence of any business enterprise that is of the same scope or type as LKQ's. Further, with regard to the relative capacity of each party to bear the burden of ceasing or mitigating the usage of its land, the evidence before the court shows that LKQ is a multinational corporation and has the resources to significantly lessen the noise of which Mr. Reed complains, while Mr. Reed does not have the capacity to fix or eliminate the problem, absent selling his home and moving. Additionally, as already stated above in the court's analysis of whether the effect of the dust and debris blown from LKQ's construction and operation onto Mr. Reed's property was unreasonable, LKQ's motive in causing the interference is financial gain and the social utility of an automotive reclamation facility (especially given that three other such facilities are located in the Dallas-Fort Worth area) does not vitiate the long-revered right to the use and enjoyment of one's home.

Mr. Reed has proved by a preponderance of the evidence all of the necessary elements of his intentional nuisance claim based on noise from LKQ's construction and operation of its facility. Accordingly, he is entitled to damages.

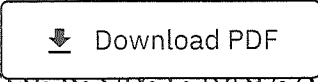
4. Negligent Nuisance Claim

Mr. Reed has failed to prove that his negligent nuisance claim is governed by ordinary negligence principles, and

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inquiry and a question of law; liability cannot be imposed if no duty exists.” *Kroger Co.*, 197 S.W.3d at 794. A property owner has a duty not to use his property in a way that injures another. *Crosstex*, 505 S.W.3d at 591 (citation omitted); *see also id.* at 614 (“In the conduct of one’s business or in the use and exploitation of one’s property, the law imposes upon all persons the duty to use ordinary care to avoid injury or damage to the property of others.”) (citation omitted). When breach of that duty substantially interferes with use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities, it has caused a nuisance. *Id.* at 600.

Reed’s only contention in the Joint Pretrial Order regarding a duty, or breach of a duty, is that LKQ has not fulfilled its promise to plant trees and build a fence that would protect his home and property from activities conducted by LKQ. Joint Pretrial Order 1 (Doc. 69). “It is a well-settled ruled that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial.” *Kona Tech. Corp. v. Southern Pac. Transp. Co.*, 225 F.3d 595, 604 (5th Cir. 2000) (citations omitted). “If a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint.” *Id.* (citations omitted). Once the pretrial order is  unless the court modifies it.” *Reed v. LKQ Corp.*, 2023 WL 2811047, *15 (D. Kan. 7/13/23). LKQ’s

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C. Conclusions Regarding Damages and Equitable Relief

Having concluded that LKQ is liable on Mr. Reed's intentional nuisance claim, thereby entitling him to damages, the court now turns to the amount of damages, if any, to which Mr. Reed has shown himself to be entitled.

Damages in a private nuisance case are difficult to quantify; however, this difficulty does not absolve the court of its duty to assess and determine damages when there is a finding of liability, as in this case. As with all cases, the computation and award of damages need not be made with mathematical precision.

1. Actual Damages

The court concludes that Mr. Reed is entitled to monetary compensation for property damage and "psychological harm to [his] 'peace of mind' in the use and enjoyment of [his] property," see *Crosstex*, 505 S.W.3d at 596, caused by dust blowing onto his property from LKQ's construction and operation for the time period beginning the fall of 2013, and continuing through approximately June 26, 2017, when evidence introduced at trial shows that

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debris blowing onto his property from LKQ's construction that began in the fall of 2013 and continued until approximately May of 2014, when construction of LKQ's facility was completed.

The court concludes that Mr. Reed is entitled to monetary compensation for "psychological harm to [his] 'peace of mind' in the use and enjoyment of [his] property," *id.*, caused by noise generated by LKQ's construction and operation that began in the fall of 2013 and continued through the date of trial.



The court further concludes that the nuisance in this case is a temporary nuisance.¹¹ The evidence marshaled by Mr. Reed is insufficient to establish a continuing nuisance. When the nuisance is temporary, the claimant may recover "only such damages as have accrued up to the institution of the suit or (under our system) to the trial of the action." *Id.* at 610 (quoting *Baugh v. Tex. & N.O.R. Co.*, 80 Texas 56, 15 S.W. 587, 587-88 (Tex. 1891)). Mr. Reed may recover the depreciation in the rental or use value of the property, amounts for the cost of repair or restoration of his property caused by the dust and debris accumulating on his property from LKQ's construction and operation, as well as damages for his personal discomfort arising from the nuisance. See Prosser

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property from 2013, when construction began, through the date of trial. In determining the amount of damages to which Mr. Reed is entitled, however, 921 the court considers *921 the evidence he did introduce of impairment and interference with his use and enjoyment of his property caused by the dust, debris, and noise, including, without limitation, his inability to use and enjoy his outdoor property, including use of the pool or patio for his family and entertainment of guests; the interference with his ability to use his work shed; the loss of hay bales; the labor and cost of cleaning away the dust and debris from his pool on a regular basis, including cleaning the DE filters more than previously; the labor and cost of power washing his home, windows, and air condition units; and the amount necessary to compensate him for "psychological harm to [his] 'peace of mind' in the use and enjoyment of [his] property." See *Crosstex*, 505 S.W.3d at 596.

Evidence at trial was introduced by LKQ that for harm to his property caused by its construction, the sum of \$2,775 would adequately compensate Mr. Reed for the cost of cleaning the pool's DE filter for ten months, cleaning the pool for ten months, power washing air condition units (which Mr. Reed testified took him five hours), and for 200 bales of hay. Tr. 175, lines 17-25 to Tr. 176, lines 1-16; Def.'s Ex. 19. Mr. Reed did not introduce any evidence at trial of  Download PDF  Check Treatment him for these items. Accordingly, the court will use the amount offered by LKQ for

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additional sum of \$2,775 would fairly compensate Mr. Reed for the cost of repair and restoration of his property caused by the dust accumulating on his property from the time LKQ began operations in approximately June of 2014, through June 26, 2017, when it began watering down the caliche roads, abating the dust problem. Although Mr. Reed did not provide evidence of his monetary damages related to the dust blowing onto his property during LKQ's operations, given the duration and nature of the harm (lasting approximately three years), the court concludes that, at a minimum, his damages exceed the sum of \$2,775 that LKQ calculated as appropriate for damages during construction which lasted from the fall of 2013 to approximately May of 2014, a much shorter period of time.

With respect to mental anguish damages, under Texas law, to show an entitlement to mental anguish damages, a plaintiff must put on evidence showing "the nature, duration, and severity of [his] mental anguish, thus establishing a substantial disruption in [his] daily routine," or showing "a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 482 (5th Cir. 2015) (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (internal quotation marks and citation omitted)).

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anguish resulted in physical symptoms. (Citing *Parkway*, 901 S.W.2d at 443).

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the sum of \$175,000 for mental anguish damages, which the court also describes as “emotional harm” or “psychological harm to [his] ‘peace of mind’ in the use and enjoyment of [his] property,” see *922 *Crosstex*, 505 S.W.3d at 596, caused by the relentless sound of back-up beepers, scraping metal, and the car crusher, as well as the dust and debris emanating from LKQ’s facility.

In calculating the amount of damages, the court finds instructive the case of *GTE Mobilnet of South Texas Limited Partnership v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist] 2001, pet. denied). In *Pascouet*, a husband and wife who were property owners (the “Pascouets”) brought a nuisance action against GTE Mobilnet of South Texas Limited Partnership (“GTE”), after it erected a 126 foot tall cellular telephone tower (“Tower”) and equipment building (“Building”) twenty feet from their property line and sixty feet from their home. The Pascouets testified they moved from France to Houston, Texas, and ultimately decided to settle in the City of Bunker Hill Village because they were attracted by the peaceful environment and strict zoning ordinances. *Pascouet*, 61 S.W.3d at 606. The Pascouets testified that noise and bright lights in their backyard created by the construction of the Tower and Building, as well as GTE workers looking into their backyard, substantially interfere[d] with their enjoyment of their backyard and home, thereby constituting a nuisance. On the basis of their testimony, the

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evidence and the purported failure by the Pascouets to prove physical damage to their property. The appellate court disagreed with GTE, characterized its "view of nuisance liability" as "too narrow[,]" *id.* at 614, and affirmed the jury's award of \$180,000, noting that "[i]n nuisance law, loss-of-use-and-enjoyment damages compensate claimants for their personal discomfort, annoyance, and inconvenience." *Id.* at 616 (citing *Daniel v. Fort Worth & R.G. Ry. Co.*, 96 Tex. 327, 72 S.W. 578, 579-80 (1903)).

The appellate court summarized the testimony of the Pascouets that supported the award of \$180,000 to compensate them for their personal discomfort, annoyance, and inconvenience:

The Pascouets testified that the Tower and Building significantly disturbed their once-tranquil lifestyle that included gardening, socializing, dining, and lounging in their backyard. After GTE constructed the Tower and the Building, the Pascouets spent much less time in their backyard than they did before. Mr. Pascouet no longer enjoyed being in his backyard as much as he used to. The bright lights were on every night after sunset until the early morning, lighting up the Pascouets' backyard. Two air conditioners by the Building and proximate to the Pascouets' property alternated running all the time, making it difficult to have a normal conversation in the backyard. These air conditioners often

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to wanting to flee the home they loved.

Id. at 616.

Here, similarly, Mr. Reed testified that in 2001, he purchased the home and adjoining land because he enjoyed spending time outdoors. Mrs. Reed testified that the Reeds chose the property because it was located out in the country and had solitude. Mr. Reed testified that, beginning with construction in the fall of 2013 and continuing to the time of trial, because of the noise and dust produced by LKQ, he no longer enjoyed the outside areas of his home and stayed inside. He also testified that during construction, floodlights from LKQ “lit up” his back yard and the interior of his home. He testified that during LKQ’s construction, his pool was covered with dust, and he could no longer entertain friends around the pool or spend time with his family around the pool. In addition, Mr. and Mrs. Reed testified that the noise produced by LKQ was constant during its hours of operation and interfered with their ability to enjoy their home and woke them from their sleep. The noise also interfered with their son’s ability to study at the home. Although *Pascouet* involved two plaintiffs and this case involves only one plaintiff, given the duration and severity of the nuisance, which lasted longer and was of a more severe nature than that in *Pascouet*, an award of damage Mr. Reed’s annoyance, discomfort, and inconvenience.

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See McCaig v. Wells Fargo Bank (Texas), N.A., 788 F.3d 463, 482 (5th Cir. 2015) (quoting *Parkway*, 901 S.W.2d at 444 (“Expert testimony is not required to show compensable mental anguish, which may be prove[d] by the ‘claimants’ own testimony, that of third parties, or that of experts.’ ”) (McCaig court’s emphasis)); *see also Gilmore v. SCI Texas Funeral Servs., Inc.*, 234 S.W.3d 251, 258 n.4 (Tex. App.—Waco 2007, pet. denied) (“Expert testimony is not required to recover mental anguish damages.”).

LKQ has not met its burden of proving by a preponderance of the evidence that Plaintiff failed to mitigate his damages; that his claims are barred by the doctrines of accord and satisfaction; that he has waived his right to recover monetary damages as compensation for LKQ’s nuisance; or that he is estopped from recovering monetary damages as compensation for LKQ’s nuisance. Although the evidence shows that LKQ at one point offered to help pay Mr. Reed for inconveniences and damage caused by its construction (Tr. 90, lines 4-6, Tr. 95, lines 19-24), and LKQ offered Mr. Reed the sum of \$2,775 to that end (Tr. 175, lines 17-25 to Tr. 176, lines 1-16; Def.’s Ex. 19), there is insufficient evidence for the court to conclude that Mr. Reed and LKQ reached an agreement that the sum offered satisfied all amounts due and owing to compensate Mr. Reed for the effect of LKQ’s construction on his use and enjoyment of the property. **Download PDF** **Check Treatment** that he acted in any manner that would support LKQ’s assertion that he failed to

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that this proposition was not feasible because he was concerned that he would not be able to bale hay in his hay field if leaves and foliage from the trees fell into the hay. Tr. 47, lines 16-18.

The court fully understands there are competing objectives for the use of land; however, the activity of one party should not so substantially and unreasonably restrict the other in the use and enjoyment of his or her property to the extent experienced by Mr. Reed, without adequate compensation. No reasonable person would welcome a 71.5-acre automobile
924 reclamation *924 and parts distribution facility that creates a nuisance in such close proximity to his or her residence and adjacent land. It would be fatuous for the court to not award a reasonable amount of damages to Mr. Reed for the effects of LKQ's conduct, as meticulously herein set forth.

2. Exemplary Damages

Mr. Reed's request for exemplary damages will be dismissed because there is no request for exemplary damages in the Joint Pretrial Order (Doc. 69).

Even had he attempted to plead or present evidence to the court of the necessary elements of a claim for exemplary damages under § 41.001 of the Texas Civil Practices and Remedies Code, the court would reject his claim.

Under Texas law, ex
proves by clear and convincing evidence that the harm...results from: (1)

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or harm to the claimant.” *Id.* § 41.001(7). “Further, Texas law requires proof of two elements to establish gross negligence: an objective element that “the actor at the time of [the act or omission’s] occurrence involves an extreme degree of risk, considering the probability of the potential harm to others[,]” and a subjective element that the actor has “awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.” *Id.* § 41.001(11). Even if asserted in the Joint Pretrial Order, which it was not, the evidence at trial does not support either the objective or subjective elements.

3. Equitable Remedies

Another remedy that is sometimes available in nuisance cases is injunctive relief. To be entitled to injunctive relief, Mr. Reed was required to seek some form of permanent injunctive relief. The Joint Pretrial Order does not contain a claim for permanent relief or a pleading or prayer for a permanent injunction. Accordingly, the court concludes that Mr. Reed is not entitled to injunctive relief. *See Kona Tech. Corp.*, 225 F.3d at 604 (“If a claim or issue is omitted from the [pretrial] order, it is waived, even if it appeared in the complaint.”) (citations omitted).

Even had Mr. Reed



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injunctive relief, a plaintiff must plead and prove (1) a wrongful act; (2)

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remaining necessary factors to support any type of equitable relief. The Joint Pretrial Order and the testimony at trial are silent on the necessary elements of equitable relief including the issue of irreparable injury or whether there is no adequate legal remedy. Mr. Reed, therefore, has failed to state a request for a permanent injunction or equitable remedy of any type.

- ¹² Pursuant to the *Erie* doctrine, “federal courts sitting in diversity apply state substantive law and federal procedural law.” *National Liability & Fire Ins. Co. v. R.R. Marine, Inc.*, 756 F.3d 825, 834 (5th Cir. 2014) (citation omitted); see generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). “Classification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.” *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (citation omitted). Here, the court concludes that, unlike temporary restraining orders and preliminary injunctions, which are specifically provided for in Federal Rule of Civil Procedure 65 and are procedures for preserving the status quo pending a determination of the merits, state law provides the standard as to whether a permanent injunction should issue. See generally 19 The Late Charles A. Wright et al., *Federal Practice and Procedure* § 4513 (3d ed. 2016 & Supp. 2019) (collecting cases) (“Permanent injunctions, which are not provided for in Federal Rule 65, however, involve entirely different considerations [than preliminary injunctions or temporary restraining orders].”). Even were the court to apply

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and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Merritt Hawkins & Assocs., L.L.C. v. Gresham, 861 F.3d 143, 157-58 (5th Cir. 2017) (quotation marks and citations omitted).

4. Prejudgment and Postjudgment Interest in Diversity Cases in Absence of Contract or Specific Enabling Statute

Mr. Reed has requested prejudgment and postjudgment interest. In Texas, a claim for prejudgment interest may be based upon general principles of equity or an enabling statute. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985). Under both the common law and the Texas Finance Code, prejudgment interest begins to accrue on the earlier of: (1) 180 days after the date a defendant received written notice of a claim, or (2) the date suit is filed. Tex. Fin. Code Ann. § 304.104 (West 2016).

“Prejudgment interest is computed as simple interest and does not compound.” *Id.* Prejudgment interest is awarded to compensate fully the injured party, not to punish a defendant, and it is considered compensation allowed by law as additional damages for lost use of the money due between the accrual of the claim and judgment. *Higgins, Inc. v. Kenneco Energy, Inc.*, 902 S.W.2d 507, 528 (Tex. 1990). The prejudgment

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interest is "five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve System is less than five percent." *Id.* § 304.003(c)(2). As of January 30, 2020, the published rate by the Board of Governors is 4.75 percent, which is less than five percent, and the prejudgment rate, therefore, is five percent per annum.

The parties present no equitable considerations for the court to address, and it is unclear from the record when or whether LKQ received written notice of a claim from Mr. Reed. The court, therefore, determines that prejudgment interest is to be calculated from the date this action was filed on September 29, 2014, to January 29, 2020, the day before the entry of the judgment. The amount of prejudgment interest on \$180,550 is \$48,179.64.

With respect to an award of postjudgment interest, federal law applies on "any judgment in a civil case recovered in a district court...including actions based on diversity of citizenship." *926 *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 7 F.3d 1203, 1209 (5th Cir. 1993) (citation omitted). A court awards postjudgment interest pursuant to 28 U.S.C. § 1961. Accordingly, postjudgment interest shall accrue at the applicable federal rate, which is currently 1.55 percent per annum.

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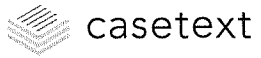
Reed's mental anguish.¹³ In light of the court's findings and conclusions herein, it will render judgment in Mr. Reed's favor on his successful claims in the amount of \$228,729.64, and against him on those claims on which he did not prevail by separate document as required by Federal Rule of Civil Procedure 58. All allowable and reasonable costs will be assessed against LKQ.

- ¹³ The court notes that had the evidence been presented in a more cohesive manner, it would not have taken the court as long as it did to issue its decision. In the final analysis, the court was able to marshal the evidence and conclude without any mental reservation that the record contains sufficient evidence to support the findings and conclusions that it made.

It is so ordered this 30th day of January, 2020.

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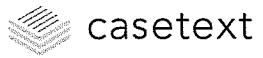
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