

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 20-3-20 Vtec &
Docket No. 48-6-20 Vtec

Costco Corp. Act 250 Permit Amendment Appeal

and

Costco Wholesale Corp Site Plan Amendment Appeal

ENTRY REGARDING MOTION

Title: Renewed Motion for Permission to File Interlocutory Appeal

Filer: Alexander J. LaRosa, attorney for Appellant, R.L. Vallee

Filed Date: November 30, 2022

Memorandum in Support of Vallee's Renewed Motion for Permission to File Interlocutory Appeal, filed on December 1, 21022, by David L. Grayck, attorney for Timberlake Associates, L.L.P.

Response in Opposition filed on 12/14/2022 by Mark G. Hall, attorney for Applicant Costco Wholesale Corporation.

The Motion is Denied.

By the pending motion, R.L. Vallee, Inc. ("Vallee") renews its request for permission to file an interlocutory appeal from two decisions of this Court. In the first decision, this Court denied Vallee's request for summary judgment and granted summary judgment to the applicant, Costco Wholesale Corporation ("Costco"), on the question of whether Costco's application is barred by Act 250 Rule 34(E) and the Stowe Club Highlands doctrine concerning permit amendments.¹ See, In re Costco Land Use Act 250 Amendment, No. 20-3-20 Vtec at 6 (Vt. Super Ct., Env'tl Div. Aug. 31, 2021) (Durkin, J.). In the second decision, this Court denied Vallee's motion to enforce and for contempt in Docket No. 104-8-12 Vtec, and with respect to Docket No. 48-6-20 Vtec, Vallee presented its motion in four parts: (1) a request that the Court require Costco to apply for and receive a permit amendment to operate its gas station on a part-time basis before the completion of certain traffic improvements, (2) a further motion to enforce and for sanctions against Costco, (3) a request to remand Costco's permit amendment application in Docket No. 20-3-20 Vtec back to the DRB, and (4) if remand is not granted, a determination that Costco is barred or estopped from applying for a permit amendment. Costco also filed a motion for summary judgment in Docket No. 48-6-20 Vtec arguing that it is entitled to seek an amendment under the precedent of In re Hildebrand, 2007 VT 5, ¶ 7, 181 Vt. 568, 569–70, 917 A.2d 478, 481 (2007). See, In re Costco Final Plat & Site Plan Application

¹ Vallee and Timberlake's Joint Question 3 asks: "Does the Costco requested permit amendment satisfy Rule 34(E) of the Act 250 Rules and the standard set by the Vermont Supreme Court in *In re Stowe Club Highlands*, 166 Vt. 33, (1996) and its progeny?" See Joint Amended Statement of Questions, filed June 11, 2020. This Question also includes numerous sub-parts, which purport to lay out the key considerations for the Court. See *id.*

and Costco Wholesale Corp. Site Plan Amendment Appeals, Nos. 104-8-12 Vtec & 48-6-20 Vtec at 2 (Vt. Super Ct., Env'tl. Div. Sept. 2, 2021) (Durkin, J.).

Vallee is represented in this matter by Alexander J. LaRosa, Esq., Timberlake Associates, L.L.P. ("Timberlake") is represented by David L. Grayck, Esq., and Costco is represented by Mark G. Hall, Esq. The Vermont Natural Resources Board ("NRB") is participating in the Act 250 appeal pursuant to 10 V.S.A. § 8504(n)(3) and is represented by Jenny Ronis, Esq.

Both Vallee and Timberlake initially filed a timely request for permission to file an interlocutory appeal, which this Court denied. *See, In re Costco Land Use Act 250 Amendment*, No. 20-3-20 Vtec at 6 (Vt. Super Ct., Env'tl Div. Dec. 20, 2021) (Durkin, J.).

Valle, joined by Timberlake, now renews their request for permission to file an interlocutory appeal of our August 31, 2021 and September 2, 2021 decisions, meaning that they are seeking permission to file an interlocutory appeal some 456 and 453 days, respectively, from the dates that those decisions were issued. Vallee and Timberlake's request are far removed from the deadline to file an interlocutory appeal request of "within 14 days after entry of the order or ruling appealed from" (pursuant to V.R.A.P 5(b)(5)(C)) and far removed from the secondary deadline "of within 14 days after entry of the order of denial, file a motion for permission to appeal in the Supreme Court" (pursuant to V.R.A.P 5(b)(7)(A)).

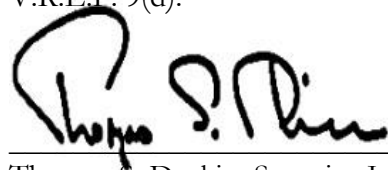
On this notion alone, that Vallee's and Timberlake's renewed interlocutory appeal motion is untimely by nearly 400 days, we have no choice but to **DENY** their motion.

In their memoranda in support of their motion, both Vallee and Timberlake express a legitimate frustration with the delay in setting these matters for trial. The Court joins in this frustration. The COVID pandemic has been a curse upon our world in general, and this Judiciary in particular. However, both Vallee and Timberlake will recall that the Court has previously attempted to set these matters for trial on several occasions over the last year, via a remote hearing. Each time, counsel for Vallee and Costco have, perhaps wisely, insisted that due to the complexities of these appeals, they should not be heard remotely, but rather in person. Over the course of the past year, the Court has conducted no less than five status conferences (on February 7, 2022, June 16, 2022, August 1, 2022, October 24, 2022, and November 21, 2022) with the parties in these appeals, in an effort to move them forward.

Given the strong need to continue our efforts to bring these appeals to resolution, this Court will conduct another pre-trial status conference on **March 13, 2023, at 4:00 pm**, in an effort to set these matters for trial. A separate notice of hearing will also be provided. At this conference, the parties should be prepared to discuss with the Court an anticipated length of trial, whether the trial shall be scheduled in April, May, or June, and a deadline for filing their list of unavailable dates.

For all these reasons, Vallee's renewed request for permission to file an interlocutory appeal is **DENIED**.

Electronically signed on February 28, 2023, at Brattleboro, Vermont pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Environmental Division