VERMONT SUPERIOR COURT
Environmental Division
32 Cherry St, 2nd Floor, Suite 303,
Burlington, VT 05401
802-951-1740
www.vermontjudiciary.org

Docket No. 22-ENV-00065

| **In re Cortina Inn** | **Decision** |
|---|---|

This matter is an appeal of Jurisdictional Opinion #1-405 (the JO) issued June 13, 2022 by the Act 250 District 1 Coordinator concluding that there had been a change of use at the Cortina Inn (Inn) in the Town of Rutland (Town), Vermont requiring an Act 250 permit amendment. Specifically, the JO concluded operation of the Cortina Inn, a hotel, as transitional housing as a part of the State of Vermont Department of Children and Families' Transitional Housing Program (THP), providing long term housing in hotels to those experiencing homelessness in Vermont, was a material change to its existing Act 250 permit requiring an amendment. The Cortina Inn was owned and operated by Tulsi Rudraksha Hospitality, LLC at the time of the JO. The Inn has since been sold to ARD Reality, LLC (Appellant).[1] The JO was requested by the Town. Appellant appealed that decision to this Court on July 11, 2022.

In a June 26, 2023 Decision on Appellant's and Town's cross-motions for summary judgment, this Court concluded that the appeal was moot. See In re Cortina Inn, No. 22-ENV-00065 (Vt. Super. Ct. Envtl. Div. June 26, 2023) (Walsh, J.). This was because the undisputed material facts demonstrated that the THP program had expired, and Appellant was no longer providing transitional housing on a long-term basis at the Property. Id.

The Court held a status conference on July 5, 2023 to discuss the Court's June 26 decision with the parties. The Town and City of Rutland (City) expressly requested a decision on the merits

[1] ARD Reality is not presently a party to this appeal. It should be noted, however, that the Town has filed a letter with the Court noting that the principle of Tulsi is the manager to ARD Realty. Appellant's counsel has not responded to this letter disputing this or otherwise providing any substitution of party.

of the issue before the Court. For the foregoing reasons, we turn to the merits of the parties' cross-motions.

In this matter Appellant is represented by Stephen Cusick, Esq. and Philip Zalinger, Esq. The Town is represented by Kevin Brown, Esq. The NRB is represented by Jenny Ronis, Esq. The City has appeared as an interested party in this matter and is represented by Joseph McLean, Esq.

**Legal Standard**

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); V.R.E.C.P. 5. The nonmoving party "receives the benefit of all reasonable doubts and inferences." Robertson v. Mylan Labs., Inc., 2005 VT 15, ¶ 15, 176 Vt. 365. When considering cross-motions for summary judgment, such as the Court is presented with here, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairport Commc'ns, Inc., 2009 VT 25, ¶ 5, 186 Vt. 332.

For the purposes of the motion, the Court "will accept as true all allegations made in opposition to . . . summary judgment, so long as they are supported by affidavits or other evidentiary material." Robertson, 2004 VT at ¶ 15. As such, a party opposing a motion for summary judgment "cannot simply rely on mere allegations in the pleadings to rebut credible documentary evidence or affidavits . . . but must respond with specific facts that would justify submitting [their] claims to the factfinder." Id. (citing Gore v. Green Mtn. Lakes, Inc., 140 Vt. 262, 266 (1981); V.R.C.P. 56(e); State v. G.S. Blodgett Co., 163 Vt. 175, 180 (1995)).

**Undisputed Material Facts**

The Court recited undisputed material facts in its June 26, 2023 Decision. The Court has not been presented with grounds to reconsider those facts. We therefore incorporate those facts fully in the present decision. Specifically, we incorporate facts 1 through 38 of that decision. We add additional facts needed for this decision. For ease of reference, we begin our additional facts at number 39.

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the purpose of deciding the pending motions. The following are not specific factual findings relevant outside this summary judgment decision. See Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000)).

39. Prior to the COVID-19 pandemic, the Property had an annual occupancy rate of approximately 60% to 70%. See Affidavit at ¶ 5.

40. Of those occupying the hotel at that time, approximately 20%, or one-fifth, were rooms occupied for long-term stays, usually for terms of a week to several months. Affidavit at ¶ 5.

41. There's been no representation that, prior to the COVID-19 pandemic, rooms were occupied for 18 months or stays of similar lengths to those allowed for under the THP.

42. After July 1, 2022, the Property's room occupancy rate averaged 60% to 70%. Affidavit at ¶ 13.

43. While the number of individuals staying at the Property decreased due to occupancy rules under the program, the room occupancy rate was the same as before the pandemic.

**Discussion**

The sole issue before the Court is whether Appellant required an Act 250 permit amendment to participation in the THP program and provide housing on a long-term basis at the Property.[2] For the reasons set forth below, we conclude that it did.

We begin with a threshold matter. The Court in its June 26, 2023 decision concluded that this appeal has been mooted by the cessation of the THP program as the scope of the pending request was specific to the provision of long-term housing under this specific program. Thus, we were without the ability to rule upon the underlying request for a jurisdictional opinion because we would not order Appellant to obtain a permit amendment for ceased activities. At the July 6, 2023 status conference, we discussed how this conclusion would affect the parties, particularly Appellant, as the underlying jurisdictional opinion concluding that jurisdiction had been

[2] Appellant represented at the July 6, 2023 status conference that the June 26, 2023 Decision resolved Question 5, which addressed DCF's ability to create housing programs "without incurring legal, financial or moral responsibility for the social ramifications of concentrating substantial numbers of [those meeting the definition of literal homelessness] in once location?" Thus, we **DISMISS** this Question.

triggered. Because Appellant could be potentially subject to enforcement based on the jurisdictional opinion, even though the Court would not require the Inn to seek a permit amendment at this time, a ruling on the merits of the request is not advisory. This decision addresses the merits of the challenge to the JO.

"A permit amendment shall be required for any material change to a permitted development or subdivision, or administrative change in the terms and conditions of a land use permit." Act 250 Rules, Rule 34(A). Act 250 Rules define "material change" as "any cognizable change to a permitted development . . . which has a significant impact on any finding, conclusion, term or condition of the project's permit or which may result in a significant adverse impact with respect to any of the criteria specified in 10 V.S.A. § 6086(a)(1) through (a)(10)." Act 250 Rules, Rule 2(C)(6). A "cognizable change" is "any physical change or change in use, including, where applicable, any change that may result in a significant impact on any finding, conclusion, term or condition of the project's permit." Act 250 Rules, Rule 2(C)(26).

We apply a two-prong test to determine whether a permitted development has undergone a material change. In re Request of Jurisdictional Opinion re Changes in Physical Structures & Use at Burlington Int'l Airport for F-35A, 2015 VT 41, ¶ 21, 25, 198 Vt. 510 (setting forth the analysis for whether a change is substantial, but then noting that the analysis of whether a change is material is similar). First, there must be a cognizable physical change or change in use. Id. at ¶ 25; see also In re N.E. Material Grp LLC Act 250 JO #5-21, 2016 VT 87, ¶ 4, 202 Vt. 588 (noting that even a modest change may be cognizable if the change is recognizable or distinct from what preceded it). Second – and only if there has been satisfaction of the first prong of the analysis – the Court analyzes whether the change has "the potential for significant impact under any of the Act 250 criteria." Id.

A review of the undisputed facts shows that the Property underwent a material change triggering the need for a permit amendment during the period when Appellant participated in the THP and provided long-term agreement-based housing at the Property.

First, the Property is a hotel. Prior to the pandemic it had a 60% to 70% occupancy rate and, of that occupancy, only 20% stayed longer than a week. While some of those longer-term stays occurred for a few months, there is no evidenve that the Property ever housed guests on

beyond a few months. There is no evidence that Property ever housed guests pursuant to a lease or other occupancy agreement. Thus, prior to the pandemic, the Property was classified as one for largely short term to medium term stays. Even after the pandemic began and Appellant participated in the State's emergency voucher program, the stay vouchers were for one- or two-night stays, with a maximum of 28 vouchers per household.[3] Thus, assuming that a household received 28, two-night vouchers, the maximum that they could stay at the Property was 56 days, or 8 weeks. Until February 2022, the Property housed both voucher recipients and privately paying guests on a generally equal basis. Thus, at least until February 2022, the Property's use was for short to medium stays, consistent with its pre-pandemic use.

At some point in 2022, however, Appellant began participating in the THP program and no longer allowed privately paying guests to stay at the Property. This program allotted for long-term stays through a lease-like agreement between participant and Appellant. By July 1, 2022, the Property was approximately 70% occupied, which is the same as pre-pandemic levels. Effectively, the Property went from a typical hotel, offering short to medium-length stays, to something more akin to an apartment building, where households stay for a year or more as residents pursuant to an agreement with Appellant. We conclude that this change is a cognizable change in use, satisfying the first prong of the material change analysis.

We next turn to the second prong of the material change analysis. A property that is being occupied as many individuals' and households' primary residence will likely have many different impacts than a hotel serving guests on a short-term basis under an Act 250 criterion. The Town's main point of contention in this matter is impacts to municipal services under Criterion 7. The change in use from hotel to something more like an apartment building has the potential for significant adverse impacts under Criterion 7.[4] Thus, we conclude that Appellant's change in use from a provider of largely short-term stays to a provider of largely long-term stays had the potential for adverse significantimpacts underAct 250 criteria, satisfying the second prong of the analysis.

[3] We note that the voucher program was not the basis of the requested jurisdictional opinion, but include this discussion to address the full scope of the Property's use in recent years, which is heavily disputed by the parties.

[4] Other criteria may also be impacted by such a change. We have not received such an allegation, however.

The Property therefore had a material change that warranted Appellant seeking a permit amendment. For the reasons set forth in this Court's June 26, 2023 Decision, however, Appellant is no longer participating in the THP program and is no longer providing lease-based long-term stays under that program.

**Conclusion**

For the reasons set forth herein, we conclude that the Property underwent a material change when it ceased offering largely short-term stays to the general public and transitioned to largely providing long-term stays under the THP program to program-participants pursuant to lease-like agreements. Because the THP program has ceased operating and because the Inn is no longer offer long-term stays under the THP program or otherwise we do not require Appellant to seek an Act 250 Permit Amendment.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed this 17th day of August 2023, pursuant to V.R.E.F. 9(D).

Thomas G. Walsh, Judge
Superior Court, Environmental Division