STATE OF VERMONT

SUPERIOR COURT **ENVIRONMENTAL DIVISION**

BURTON CORPORATION, **Docket No. 20-ENV-00010**
APPEAL, CONDITIONAL USE PERMIT

BURTON CORPORATION, **Docket No. 22-ENV-00030**
APPEAL, ACT 250 DISTRICT COMMISION DETERMINATION

Decision on Post-judgment Motions

These appeals concern the proposed use of a portion of a building in a district zoned for Enterprise and Light Manufacturing (ELM) in Burlington, Vermont on property adjacent to the City of South Burlington. Applicant Burton Corporation seeks approval for part of the building to be used as a performing arts center by Higher Ground, a concert organization, for a wide variety of types of musical performances. A performing arts center is allowable as a conditional use in the ELM district. In a July 10, 2023 Decision, this court approved the project with conditions. See In re Burton Corp., et al, Nos. 20-ENV-00010, 22-ENV-00030 (Vt. Super. Ct Envtl. Div. Jul. 10, 2023) (Teachout, J.) (hereinafter the Decision). Appellants, CRZ group (conditional use appeal) and several individual neighbors1 (Act 250 appeal), now move for reconsideration of the Decision.

Specifically, Appellants have moved to:

(a) amend findings in the July 10, 2023 Decision pursuant to V.R.C.P. 52(b);

(b) reopen the case to take additional evidence pursuant to V.R.C.P. 59(a); and

(c) amend the judgment pursuant to V.R.C.P. 59(e).

For the reasons set forth below, the motion is **GRANTED IN PART** and **DENIED IN PART**. The specific requests and related issues are addressed below with reference to the numbered sections in Appellants' motion.

Legal Standards

Appellants rely on the above three provisions in the Rules of Civil Procedure, each of which has a different purpose, although there can be overlap.

V.R.C.P. 59(e): This rule authorizes motions to amend or alter a judgment within certain parameters.[1] The Vermont Supreme Court, in the case of In re Green Mountain Power Corp., 2012 VT 89, ¶ 51, 192 Vt. 447, reaffirmed its prior ruling in In re SP Land Co., 2011 VT 104, ¶ 16, 190 Vt. 418 in which it stated: "Under this rule, the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself. That is, Rule 59(e) codified the trial court's inherent power to open and correct, modify, or vacate its judgments. The trial court enjoys considerable discretion in deciding whether to grant such a motion to alter or amend." In re Green Mountain Power Corp. at ¶ 51. Nonetheless, the rule does not provide the opportunity for a party to relitigate the case it has already presented.

> Under Rule 59(e), reconsideration 'is appropriate only where the movant demonstrates that the Court has overlooked controlling decisions or factual matters that were put before it on the underlying motion. . .and which, had they been considered, might have reasonably altered the result before the court. . . . A motion for reconsideration may. . .be granted to 'correct a clear error or prevent manifest injustice.' . . .The motion should not be granted, however, where the moving party seeks to relitigate issues already considered thoroughly by the court." Chets Shoes, Inc. v. Kastner, 710 F. Supp. 2d 436, 454 (D. Vt. 2010), aff'd, 449 F. App'x 37 (Fed. Cir. 2011) (internal quotations and citations omitted).

V.R.C.P. 52(b): Motions to amend findings of fact (and, if appropriate as a consequence, a judgment) are made pursuant to Rule 52(b). "The purpose of Rule 52(b) is to allow a court to correct manifest errors of law or fact, or in limited circumstances to present newly discovered evidence, but not to [] relitigate old issues, to advance new theories, or to secure a rehearing on the merits. . . . Nor are parties to use Rule 52(b) to allow parties to present their case under new theories.") (internal quotations and citations omitted). Gutierrez v. Ashcroft, 289 F.Supp.2d 555, 561 (D.N.J. 2003).

V.R.C.P. 59(a): Motions to reopen the evidence to take additional evidence are made pursuant to V.R.C.P. 59(a). The rule does not provide grounds for simply adding additional evidence upon the request of a party. "Its purpose is, in line with most discretionary privileges of a trial court, directed at preventing a miscarriage of justice and allowing corrective action to the end to be taken promptly at the trial court level before review. Thus, the presentation of new evidence need not be allowed the merely dilatory, and ought not to be allowed to the prejudice of another party." State Highway Bd. V. Jamac Corp, 131 Vt. 510, 515-516; 310 A.2d 120 (1973).

With these standards in minds, Appellants' requests are addressed below.

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[1] While Appellants' motion is made pursuant to Rule 52(b), 59(a), and 59(e), it only cites to law applicable to Rule 59(e) motions. See Appellant's Motion to Reconsider, Memorandum of Law at 2, filed on Aug. 7, 2023 (citing In re SP Land Co., 2011 VT 104, ¶ 16, 190 Vt. 418) (addressing the standards applicable to Rule 59(e) motions).

Analysis

2. A. Noise limits. Appellants originally claimed in their post-judgment motion that the 45 dbA 1-hour Leq average noise limit terminates in one year, followed by only a 60 dB A standard thereafter. In their Reply memorandum, they have withdrawn that claim, and acknowledge that both the 45 dbA Leq 1 hour standard and the 60 dbA Lmax standard are permanent.

Appellants nonetheless seek an amendment to the judgment to mandate a 45 dbA Lmax standard rather than a 45 dbA Leq 1-hour standard. This issue was decided by the court following extensive presentation of evidence and arguments presented by counsel, and Appellants have not shown either facts or a legal basis for revisiting it. The fact that other limits have been imposed in other cases does not require such limits to be imposed in this case.[2] The court has analyzed the noise evidence in relation to the location and context of this particular project, including the level of noise generated by other properties in the ELM zone as well as the character of noises that come from the larger surrounding city environment. The motion does not point out any facts overlooked by the court or any incorrect application of the law. The court declines to amend any findings or the Decision or judgment on this issue.

B. Limiters. Appellants note that the court relied on Higher Ground's representation that it would use a limiter device if necessary if performance music exceeded the required noise limit. Appellants argue that the court should mandate the use of a limiter. The court declines to do so for several reasons. First of all, this was not raised as an issue in Appellants' Statement of Questions or requested by Appellants prior to this post-judgment motion. The request is being made for the first time after the trial and Decision.[3] See Northern Sec. Ins. Co. v. Mitec Elecs., 2008 VT 96, ¶ 44, 184 Vt. 303 (noting that a Rule 59(e) motion should not be used to "raise arguments or present evidence that could have been raised prior to entry of the judgment.") (quoting 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil § 2810.1, at 127-28 (2d ed. 1995)).

Moreover, the evidence does not support a finding that it is necessary. If all of the other strategies for regulating noise are effective to meet required noise limits as expected, use of a limiter device may not be needed at all. Applicant is required to meet the noise standards imposed. It represents that it will use a limiter as a supplement to other noise mitigation measures if and when necessary to be in compliance with the required standard. The court declines to impose a condition that calls for mandatory use of a device that may only become

[2] This is consistent with Vermont's general approach to noise in land use cases. There is no state-wide quantitative noise standard. See, e.g., In re Chaves, 2014 VT 5, ¶ 31 n. 4. While benchmarks have been adopted for some circumstances, the Vermont Supreme Court has held, in reviewing decisions from this court, that noise standards must be applied flexibility to address various circumstances and project locations. See In re Lathrop P'Ship I, 2015 VT 49, ¶ 81-82, 199 Vt. 19 (citations omitted); Chaves, 2014 VT 5, ¶ 33.

[3] Appellants in their Reply to Opposition point out that their attorney asked Mr. Crothers during testimony if he would agree to a permit condition requiring use of the limiter at trial. See Appellants' Reply to Opposition, at 4. The Applicant's witness declined but acknowledged that it is a tool it has at its disposal to use as needed. While limiters were discussed, Appellants did not take any action beyond this sole question to advocate for such a permit condition.

appropriate as a remedial measure during specific performances in order to stay within the required noise limits. There are numerous other conditions in place to regulate external noise generated by the project. It is sufficient that the Applicant has expressed an intention to use the device if and when it may be needed as a supplement to other safeguards. The request for an amendment to the judgment to add a condition mandating the use of limiters is denied.

3. Conditions from the DRB and District Commission. Appellants accurately note that the court did not *explicitly* incorporate all of the Development Review Board's and the District Commission's conditions other than those modified on pages 33 and 34 of the Decision. The court intended such incorporation, as may reasonably be inferred from the Decision. Because it may be helpful for all of the conditions to be set forth in single amended judgment, including additions and amendments resulting from this ruling, the court grants the motion for an amended judgment pursuant to V.R.C.P. 59(e) for the purpose of doing so. Appellants' counsel shall submit a proposed form of judgment incorporating and updating all conditions.

Appellants note that Conditions 4 and 7 of the Conditional Use Permit are based on documents that were not in evidence before the Environmental Division although they were in evidence before the DRB and District Commission. Updated versions of those documents, specifically an updated noise assessment and an updated Operational Management Plan, were in evidence before this court as Exhibits 6 and 20, respectively. The motion to amend the judgment is granted on this issue to improve accuracy by referencing the updated exhibits before this court to make clear that the Decision and judgment are based on the updated versions of Exhibits 6 and 20. Attorney Dumont shall also include the Development Review Board's Condition 19 and include as well Burlington's standard permit conditions 1-15, which were not challenged on appeal but are apparently missing from the record evidence before this court.[4]

Appellants question whether the court "appears to authorize additional parking on grassy areas on the subject lot and on available space in the adjacent Burton lot, which parking spaces were not presented to and approved of by the Board." Memorandum of Law at 9. To clarify, the court has made no changes to the number of 426 parking spaces previously authorized or required. The findings simply reflect the credible testimony of traffic expert Jennifer Conley that there is extra space available in case of an unforeseen event that for any particular performance, there are more vehicles than formal available parking spaces. The required traffic management staff can direct such overflow parking in an orderly manner so as not to burden surrounding

[4] To the extent that Appellants argue on page 5 of their Reply memorandum that they were not required to challenge these conditions and that the court should reopen the evidence to determine the applicability of each of these standard conditions, the request is denied. V.R.E.C.P. Rule 5 (f) is entitled "Statement of Questions" and requires that within 21 days of filing a notice of appeal, "the appellant shall file with the clerk of the Environmental Court a statement of the questions that the appellant desires to have determined. . . . The appellant may not raise any question on the appeal not presented in the statement as filed, unless otherwise ordered by the court in a pretrial order entered pursuant to subdivision (d) of Rule 2." Appellants had adequate opportunity to challenge these standard conditions but did not do so either through their Statement of Questions or even at trial. The Rule 59(a) and (e) standards for reopening evidence and amending the judgment cited above have not been met, and Appellants cannot, post-judgment, challenge them now. To grant Appellants' request to reopen and reassess these unchallenged conditions would be to promote piecemeal litigation and to create inconsistency and uncertainty in the land use permitting process.

neighborhood streets with patron parking. As noted in the Decision, the Applicant is responsible for management of patron parking in a manner that will not impose externalities on the surrounding neighbors, and the court's finding on this issue shows that this can be done as a practical matter due to the availability of overflow space and the requirement that Applicant staff provide parking management. This does not change the requirement that the project be built with 426 spaces as required by permit conditions.

4. Closed doors requirement. Appellants allege that uncertainty is created by the fact that the Operational Management Plan, which is required to be followed by Condition 7 of the Conditional Use Permit, calls for all doors to be closed during performances, whereas provisions of the Decision appear to allow patrons to pass through the sound-lock doors, which are required for the main entrance and the door to the outdoor lounge, during performances. The motion to amend the findings pursuant to Rule 52(b) is granted on this issue, as clarification is warranted. No additional evidence is needed. The following additional paragraph is added as a footnote following the sentence ending in "Condition #7" located in the second to the last line on page 7:

> The Operational Management Plan mandates that all doors be closed during performances and both the DRB and District Commission permits mandate compliance with this requirement. The Act 250 permit mandates that the doors at the main entrance and any doors leading to the outdoor lounge are required to be sound-lock doors. Other emergency exit doors are not required to be sound-lock doors but are required to be monitored by Higher Ground staff so that they remain closed during performances. The court finds from the evidence that while there are many models of sound-lock doors, the essential feature of a sound-lock door is to prevent the escape of sound by a design that creates the effective equivalent of a wall while still allowing people passage between such a "wall" and the outside. For example, a common design involves a second set of doors that are closed while a person passes through a first set, and the first set is closed while the person passes through the second set. Because of the functionality of the design of sound-lock doors, at least one set is always closed. Because of this design, sound-lock doors are inherently and effectively "closed" at all times as there is always a 'wall' preventing the escape of sound. Thus, their use during performances is consistent with the requirement that all doors be closed during performances. As with other 'regular' doors, it will be the responsibility of Higher Ground staff to monitor the use of sound-lock doors to make sure that there is always at least one 'wall' closed during performances, specifically that when two or more people use them, at least one set of doors is closed at all times during performances.

While this addition amends the findings, the judgment itself is not amended on this issue.

5. Burlington Noise Ordinance as Performance Standard. Appellants argue that the court adopted an interpretation of 24 V.S.A. § 4414(5) that no party advocated and is

clearly erroneous. The circumstances of the case called for the court to analyze whether Burlington's noise ordinance qualified as a performance standard under 24 V.S.A. § 4414(5) such that the Applicant was required to demonstrate that its project would be in compliance with it. Appellants argued that Applicant was required to show compliance with the noise ordinance, and the Applicant and the City of Burlington argued that it was not. This was a significant issue of interpretation of law that called for consideration of legal arguments from the attorneys, which they provided extensively. Ultimately it was up to the court to interpret the applicability of the relationship between the zoning and noise ordinances as a matter of law, and to do so in light of their terms, rules of construction, and the factual context of the case. Appellants argue for the interpretation they advocated both at trial and in their post-trial memorandum but have not persuaded the court that its interpretation set forth in the Decision was in error. The motion to change the legal analysis and amend the judgment on this issue is denied.

Summary

For the foregoing reasons,

1. The motion pursuant to V.R.C.P. 52 (e) to amend the findings is granted to the extent that the indented paragraph above under paragraph 4 is added to the Findings of Fact section of the Decision as a footnote following the sentence ending in "Condition #7" located in the second to the last line on page 7.
2. The motion pursuant to V.R.C.P. 59 (e) to amend the judgment is granted to the extent that an amended judgment shall include all conditions from the DRB and District Commission permits, including the text of special conditions, with the additions and modifications on pages 33-34 of the Decision of July 10, 2023. Pursuant to V.R.C.P. 58 (d), Appellants' attorney shall prepare a form of amended judgment no later than September 22, 2023. Other counsel shall have 7 days from filing to file any objections to the form.
3. Except as stated in paragraphs 1-2 immediately above, the motions are otherwise *denied.*

Electronically signed September 6, 2023 pursuant to V.R.E.F. 9 (d).

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned