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No. 104-8-12 Vtec
No. 48-6-20 Vtec

Costco Final Plat & Site Plan	104-8-12 Vtec
Costco Wholesale Corp. Site Plan Amendment	48-6-20 Vtec

DECISION ON MOTIONS

This decision addresses two municipal matters concerning the same project: a gas station proposed and now operated by Costco Wholesale Corporation ("Costco") at its property on Lower Mountain View Drive in Colchester, Vermont. Docket No. 104-8-12 Vtec was an appeal, resolved by this Court in 2015, of the several state and municipal permits, including the approval by the Town of Colchester Development Review Board ("DRB") of Costco's revised final plat and site plan amendment application ("2015 Approval").[1] On May 15, 2020, original appellant R.L. Vallee, Inc. ("Vallee") filed a post-judgment motion to enforce the Court's 2015 order, and for contempt. Interested person Timberlake Associates, LLP ("Timberlake") adopted Vallee's motion.

Docket No. 48-6-20 Vtec is a new appeal of the DRB's June 22, 2020, decision approving a site plan amendment application submitted by Costco and authorizing operation of the gas station for limited hours ("Site Plan Amendment Appeal"). Costco, Vallee, and Timberlake each filed a notice of appeal. Each filed a Statement of Questions. On June 29, 2020, Vallee filed a motion to enforce an automatic 14-day stay, and to sanction Costco for unpermitted operations. Timberlake has joined and adopted Vallee's motion.

[1] The 2015 Approval addressed the multiple final plat and site plan improvements incorporated in Costco's permit applications; only one of those site improvements is relevant to the pending motions: the additions of gas pumps at the Costco facilities.

Vallee has now filed a motion for summary judgment encompassing both dockets. The motion incorporates 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: (1) requests a declaration that Costco required a permit amendment to operate its gas station before the completion of certain traffic improvements, (2) incorporates Vallee's motion to enforce and for sanctions, (3) requests a remand of Costco's amendment application back to the DRB, and (4) if remand is not granted, seeks a determination that Costco is barred or estopped from applying for a permit amendment. Costco has 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 Hildebrand analysis.

Vallee is represented in these matters by Alexander J. LaRosa, Esq. Timberlake is represented by David L. Grayck, Esq., and Costco is represented by Mark G. Hall, Esq. The Town of Colchester ("Town") is participating in Docket No. 104-8-12 Vtec as an interested person and is represented by Claudine C. Safar, Esq.

Legal Standard

We will grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), applicable through V.R.E.C.P. 5(a)(2). We accept as true all of the nonmovant's allegations of fact, as long as they are supported by affidavits or other evidence. White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). In considering cross-motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332.

Factual Background

We recite the following background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the sole purpose of deciding the pending motions. The following are not specific factual findings with relevance outside of 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) (mem.)).

1. In 2011, Costco sought municipal zoning permits from the Town to open and operate a gas station at its property located on Lower Mountain Drive and Hercules Drive in Colchester, Vermont, together with other site improvements not relevant to the pending motions. Costco's proposal was to operate the gas station full-time.

2. Consultants for Costco and the Town reviewed the traffic implications of the gas station proposal and concluded that there would be transportation impacts unless certain traffic improvements were implemented. The improvements identified were centered around the intersection of Upper/Lower Mountain View Drives and US Routes 2/7, in the vicinity of I-89 Exit 16 in Colchester ("MVD Improvements").

3. The MVD Improvements were identified to mitigate the traffic impacts of Costco's proposal based on an analysis of the highest hourly traffic flows on weekdays: the weekday PM peak hour.

4. The MVD Improvements included: the addition of a second dedicated left-hand turn lane, for use by travelers turning south on Routes 2/7; the addition of a dedicated right-hand turn lane, for use by vehicles waiting to travel north; and the addition of another travel lane to serve through traffic and right-hand turn traffic.

5. In proceedings before the DRB, Costco indicated a willingness to implement the MVD Improvements prior to the construction or operation of the gas station.

6. In reviewing Costco's Final Plat and Site Plan applications, the DRB considered the MVD Improvements as Costco's proposed traffic mitigation together with a requirement that Costco pay its fair share of the cost of the improvements. *See* In re Costco Final Plat and Site Plan Approval, Findings of Fact and Order, at 7 (Colchester Dev. Rev. Bd. July 25, 2012).

7. On July 25, 2012, the DRB approved Costco's Final Plat and Site Plan applications, with conditions (the "Municipal Permit"). Id. at 9.

8. Condition 11(b) states, in relevant part: "The applicant shall be required to provide off-site mitigation in the form of contributing to [the MVD Improvements]." The Condition goes on say: "Prior to the issuance of a building permit the applicant shall enter into a memorandum of understanding with the Town of Colchester governing these off-site mitigations and then determine a method for payment of the above referenced proportional fair share of these improvements." Id. at 11.

9. Also in 2012, Costco submitted an Act 250 permit amendment application seeking approval for the gas station, among other site improvements.

10. On January 24, 2013, the District #4 Environmental Commission issued Land Use Permit #4C0288-19C ("Permit -19C") authorizing the gas station, subject to conditions. The permit contemplated full-time operations of the gas station.

11. Condition 29 of Permit -19C requires Costco to construct or fund the construction of the MVD Improvements – the same improvements contemplated in the Municipal Permit. Pursuant to Condition 29, Costco may not operate its gas station until the MVD Improvements are complete.

12. The MVD improvements are part of a larger project undertaken by the Vermont Agency of Transportation ("VTrans"), which includes other improvements to the intersections between Routes 2/7 and the I-89 Exit 16 on and off ramps. This VTrans initiative is intended to alleviate significant preexisting traffic concerns and congestion in the area and is known as the Diverging Diamond Interchange ("DDI") project. The DDI project will facilitate the satisfaction of Permit -19C's Condition 29.

13. Construction of the MVD improvements will require a small expansion of the Town of Colchester's right-of-way, and therefore an acquisition of additional land, near the intersection of Lower Mountain View Drive and US Routes 2/7. This required expansion and acquisition was known to the parties early in the permitting process and is part of VTrans' DDI plan.

14. Together with Timberlake Associates, LLP ("Timberlake"), Vallee appealed the Municipal Permit to this Court, along with the Act 250 Permit -19C and "all [other] applicable local and state permit determinations issued in favor of Costco's propos[al]." *See* In re Costco Stormwater Discharge Permit Application, Nos. 75-6-12 Vtec, 104-8-12 Vtec, 132-10-13 Vtec, 41-4-13 Vtec, and 59-5-14 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Aug. 27, 2015) (Durkin, J.) [hereinafter "Costco Final Plat & Site Plan, No. 104-8-12 Vtec"]. After seven of the appeals were resolved by settlement or stipulation, the remaining five (including the appeal of the Municipal Permit) were coordinated for trial. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec at 2–4 (Aug. 27, 2015).

15. When the appeals were heard on the merits in 2014, VTrans had already begun pursuing separate permits for the DDI project: it submitted an Act 250 application for the project in late 2013. *See* id. at 6.

16. Traffic impacts were among the central issues in the Municipal Permit appeal. No party appealed Condition 11(b) concerning the MVD Improvements, but Vallee and Timberlake argued for a further condition that would prohibit Costco from operating the gas station until the entire DDI project was completed. *See* id. at 8–16, 37–39.

17. The Court noted: "Both [Vallee and Timberlake] operate convenience store/gas station facilities in the vicinity of the I-89 Exit 16 junction; both of their commercial operations contribute to and are sometimes negatively impacted by the area traffic. In fact, even though R.L. Vallee has

advocated for a condition . . . that . . . would prohibit Costco from occupying or operating its proposed improvements until after all planned VTrans highway improvements are completed, R.L. Vallee has served as one of the principal objectors to the VTrans project permit application." Id. at 7.

18. The Court also noted that one estimate found the DDI project could take "ten or more years" to finish and declined to impose a condition requiring Costco's operations to wait for the completion of all of VTrans' proposed improvements. *See* id. at 16, 38 (concluding that there was not "a sufficient correlation between the proportions of traffic contributed by Costco to warrant" such a condition).

19. Instead, the Court accepted Costco's proposed mitigation: the MVD Improvements. The Court concluded that the MVD Improvements would "fully mitigate" any traffic impacts from Costco's proposal, and Costco agreed that it would not occupy or operate the proposed gas station until the MVD improvements were completed. *See* id. at 38.

20. The Court and the parties were cognizant that the MVD Improvements were related to VTrans' DDI project and could be delayed by appeals or other complications.

21. Ultimately, the Court approved the Municipal Permit and asked the Town to issue a permit consistent with the Court's decision and the unappealed terms and conditions imposed by the DRB. *See* id. at 13–14, 51.

22. It appears that the Town did not issue a new Municipal Permit incorporating any requirements from Court's decision.

23. Though this Court's conclusion on the Municipal Permit was not appealed, Vallee and Timberlake did appeal the decision as to other issues, including traffic mitigation under Act 250. In 2016, the Vermont Supreme Court affirmed this Court's conclusion that the MVD Improvements were sufficient in the Act 250 context to mitigate "the project's contribution to the existing congestion in the area." *See* In re Costco Stormwater Discharge Permit, 2016 VT 86, ¶¶ 15–17, 202 Vt. 564.

24. In 2016, Costco and the Town entered into a Memorandum of Understanding ("MOU") concerning the MVD Improvements, which states:

> Town of Colchester recognizes that the traffic improvements of the Act 250 approval fulfill the requirement of the DRB Approval for off-site mitigation. Costco must comply with the Traffic Mitigation requirements of its Act 250 Approval that will therefore satisfy Condition 11b of the Development Review Board Approval . . . such that the building permit for the Project can be issued.

25. In 2016, VTrans received the necessary Act 250 permits for the DDI project.

26. Vallee and Timberlake appealed to this Court, and the Court approved the DDI project in 2018. *See* Diverging Diamond Interchange SW Permit, Nos. 50-6-16 Vtec and 169-12-16 Vtec (Vt. Super. Ct. Envtl. Div. June 1, 2018) (Walsh, J.).

27. Vallee and Timberlake then appealed to the Vermont Supreme Court, and in 2019 the Supreme Court affirmed in part, reversed in part, and remanded back to this Court on the issue of compliance with Act 250 Criterion 1 (undue water pollution). *See* In re Diverging Diamond Interchange SW Permit, 2019 VT 57, ¶ 1, 210 Vt. 577.

28. After a trial on remand, this Court again approved VTrans' Act 250 application for the DDI project. *See* Diverging Diamond Interchange A250, No. 169-12-16 Vtec, slip op. at 38 (Vt. Super. Ct. Envtl. Div. Apr. 16, 2020) (Walsh, J.).

29. Vallee again appealed to the Vermont Supreme Court, which affirmed this Court's decision. *See* In re Diverging Diamond Interchange Act 250, 2020 VT 98, ¶ 1.

30. To date, construction on neither the MVD Improvements nor the overarching DDI project have begun or been completed.

31. The lands necessary to construct the MVD Improvements have not been acquired by VTrans.

32. VTrans filed for condemnation of the necessary lands in June of 2019. *See* In re Transportation Project Colchester HES NH 5600 (14), No. 484-6-19 Cncv (Vt. Super. Ct.).

33. The Vermont Supreme Court's decision in Agency of Trans. V. Timberlake Assoc., 2020 VT 73 held that Vallee could intervene in the condemnation proceedings, and Vallee is now a party in those proceedings.

34. The condemnation case is ongoing.

35. It is not certain when the MVD Improvements or the full DDI project will be constructed.

36. On July 24, 2018, Costco submitted Act 250 permit amendment application #4C0288-19F ("-19F Amendment") to the Commission. The application sought to amend Condition 29 of Permit -19C, to authorize the operation of Costco's gas station only during off-peak traffic hours until the MVD improvements are completed.

37. Costco's -19F Amendment application proposes the following hours of operation for the gas station: Weekdays (Monday through Friday) 6:00AM – 2:00PM and 6:00PM – 10:00PM. Saturday 6:00AM – 11:00AM and 2:00PM to 10:00 PM. Sunday 6:00AM to 10:00PM.

38. These hours constitute a reduction of approximately 21.5% from the hours of operation contemplated by the -19C Permit, and the Municipal Permit. Under the proposed limited hours, the gas station would not operate during peak traffic times, including weekday PM peak hours

39. The Act 250 -19F Amendment application did not seek to remove Condition 29's requirement to implement the MVD Improvements, but rather to allow for limited gas station operations during the pendency of ongoing litigation and until the improvements can be completed. Under this proposal, Costco must still satisfy Condition 29 prior to full-time operation of the gas station.

40. On February 28, 2020, the Commission issued Land Use Permit #4C0288-19F, amending Condition 29 of Permit -19C and authorizing Costco to operate its gas station "during limited hours, until the roadway infrastructure work required by [Permit -19C] has been completed." *See* Land Use Permit #4C0288-19F, at 1 (Dist. #4 Envtl. Comm. Feb. 28, 2020). Amendment -19F authorized operating hours of: "6AM-2PM and 6PM-10PM on weekdays; 6AM-10AM and 6PM-10PM on Saturdays; and 6AM-10PM on Sundays." Id. at 2. An appeal of this Act 250 approval is pending before this Court under Docket No. 20-3-20 Vtec.

41. On March 19, 2020, Costco sent a letter to the Town of Colchester Zoning Administrator ("Zoning Administrator") requesting a determination that Costco did not need a municipal site plan amendment to operate its gas station for limited hours prior to completing the MVD Improvements. Costco referred to its recent Act 250 approval, the -19F Amendment, to describe the proposal.

42. In the same letter, although Costco stated its belief that no amendment was necessary, it attached and filed a site plan amendment application seeking to match the approved Act 250 -19F Amendment. Thus, Costco sought an amendment to the Municipal Permit authorizing the same reduced hours of operation until the MVD Improvements are completed.

43. Vallee filed a post-judgment Motion to Enforce and for Contempt in Docket No. 104-8-12 Vtec on May 15, 2020, requesting that this Court enforce its 2015 Decision on the Merits regarding the Municipal Permit and hold Costco in contempt for failing to comply with that Decision. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec (Aug. 27, 2015). Vallee's present motion for summary judgment incorporates the same request in that docket.

44. On May 22, 2020, the Zoning Administrator sent a letter to Costco framed as a determination. The Zoning Administrator stated that no site plan amendment was necessary to limit the hours of operation for the gas station. As to the required MVD Improvements, she cited the MOU between Costco and the Town as stating that the traffic mitigation required by Costco's Act 250 approval

would satisfy the requirements of the Municipal Permit. The letter informed Costco of its right to appeal under 24 V.S.A. § 4465.[2]

45. On May 25, Vallee send a letter to the Zoning Administrator and attached an application to appeal her determination to the DRB. The Zoning Administrator rejected the appeal,[3] citing this Court's decision in R.L. Vallee Determination Request, No. 109-9-19 Vtec (Vt. Super. Ct. Envtl. Div. May 12, 2020) (Durkin, J.), for the proposition that her correspondence with Costco was an informal advisory opinion and not an appealable decision or act of an administrative officer.

46. On May 26, 2020, Costco began operating the gas station for limited hours.

47. Meanwhile, Costco's site plan amendment application was pending at the DRB. In considering the application, the DRB noted part of Costco's presentation: "Costco does not believe that an amendment to hours [of operation] from the Town of Colchester is necessary but they are going through the process." *See* In re Costco Site Plan Approval, Findings of Fact and Order, at 2 (Colchester Dev. Rev. Bd. June 22, 2020).

48. On June 22, 2020, the DRB approved the Municipal Amendment, subject to conditions. Id. at 10. The DRB did not discuss the Hildebrand/Stowe Club Highlands analysis for permit amendment requests. Costco appealed the DRB's decision to this Court on June 26; Vallee and Timberlake followed with cross-appeals. That appeal is now before this Court under Docket No. 48-6-20 Vtec. Present motions from both Vallee and Costco seek summary judgment on the questions related to whether Costco is barred or precluded from seeking an amendment.

49. Vallee filed a Motion to Enforce Automatic Stay and for Sanctions in Docket No. 48-6-20 Vtec on June 29, 2020. Vallee's present motion for summary judgment incorporates that request.

Discussion

There are two motions for summary judgment pending before the Court. Vallee's motion addresses issues in two dockets. In Docket No. 104-8-12 Vtec, Vallee's post-judgment request seeks enforcement and a finding of contempt with respect to this Court's 2015 Decision on the Merits. In Docket No. 48-6-20 Vtec, Vallee seeks judgment in its favor on several issues. Costco's motion in

[2] Costco views this letter as a determination of the Zoning Administrator that it did not need a permit amendment to open the gas station for limited hours, prior to completing the MVD Improvements. It appears that Vallee disagrees.

[3] The Zoning Administrator actually sent two letters framed as determinations, and Vallee attempted to appeal both. Both appeals were rejected on the same grounds.

the same docket seeks a determination that the Hildebrand analysis for permit amendments is satisfied. We begin with Vallee's post-judgment request.

I. Docket No. 104-8-12 Vtec: Enforcement and Contempt

Pursuant to 24 V.S.A. § 4470(b), Vallee asks that the Court enforce its 2015 Decision on the Merits ("2015 Decision") which approved on appeal Costco's Municipal Permit for the gas station project, among other site improvements. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec at 51 (Aug. 27, 2015). In that decision, the Court concluded "that the traffic added because of Costco's [project] will not be significant." Id. at 37. "However, because th[e] area highways and intersections are already so congested and snarled," the Court welcomed "Costco's plans to complete" the MVD Improvements. Id. Further, the Court noted that the MVD Improvements would "fully mitigate" the impacts of Costco's proposal, and that Costco had agreed to complete the improvements before operating the gas station. Id. at 38. In light of these conclusions, the Court held that Costco's proposal complied with the applicable Town regulations. Id. at 37–39.

The undisputed facts show that Costco began operating its gas station for limited hours on May 26, 2020. To date, the MVD Improvements have not been constructed. On June 22, 2020, Costco received a permit amendment from the DRB to operate for limited hours. Thus, for 27 days before June 22, Costco's operations were necessarily governed by the Municipal Permit which was already in place: the permit initially approved by the DRB in 2012 and approved on appeal by this Court's 2015 Decision. Vallee asserts that Costco's permit amendment remained ineffective for an additional 19 days after June 22, under a combination of procedural rules. *See, e.g.*, 24 V.S.A. § 4449(a)(3) ("No permit . . . shall take effect until the time for appeal . . . has passed . . . ."); and V.R.E.C.P. 5(e) ("[T]he permit shall not take effect until the earlier of 14 days from the date of filing of the notice of appeal or the date of a ruling by the court under this subdivision on whether to issue a stay."). Vallee further argues that our 2015 Decision required Costco to complete the MVD Improvements prior to operating, a requirement Costco allegedly violated for a total of 46 days while its permit amendment was ineffective. Vallee requests a 46-day injunction on Costco's current operations, and whatever other relief the Court deems appropriate.

We decline to grant the requested relief in this matter. Assuming that Costco was operating in violation of the 2015 Decision, we see no basis for a finding of contempt. Vallee's request is made pursuant to 24 V.S.A. § 4470(b), which states:

> A municipality shall enforce all decisions of its appropriate municipal panels, and further, the superior court, or the environmental division shall enforce such decisions upon petition, complaint or appeal or other means in accordance with the laws of this state by such municipality or any interested person by means of mandamus, injunction, process of contempt, or otherwise.

As Vallee suggests, a motion pursuant to § 4470(b) is treated as a motion for contempt under 12 V.S.A. § 122. *See* In re Sanfacon NOV, Nos. 48-4-12 Vtec and 183-12-12 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. June 23, 2015) (Walsh, J.) (citing Sunset Cliff Homeowners Ass'n v. City of Burlington, 2008 VT 56, ¶¶ 10-11, 184 Vt. 533 (mem.); Nordlund v. Van Nostrand, 2011 VT 79, ¶ 13, 190 Vt. 188)). Section 4470(b) is "a specialized procedural device to enforce court decisions," and 12 V.S.A. § 122 provides for the initiation of contempt proceedings against any party that violates a court order. *See* Nordlund, 2011 VT 79, ¶ 13 (discussing § 4470(b)).

Compared with criminal contempt, where the purpose of the remedy is to punish a non-complying party, the purpose of a civil contempt remedy is to compel compliance with a prior court order. Sheehan v. Ryea, 171 Vt. 511, 512 (2000) (mem.). The Court has discretion to fashion an appropriate remedy. *See* id. This may include coercive sanctions under appropriate circumstances. *See* Mann v. Levin, 2004 VT 100, ¶ 32, 177 Vt. 261 (citing Vt. Women's Health Ctr. v. Operation Rescue, 159 Vt. 141, 151 (1992)). While we recognize that Vallee's initial motion sought relief while the alleged violation was ongoing, the permit amendment issued by the DRB on June 22, 2020, has since become effective and authorizes gas station operations for limited hours. Therefore, a civil contempt remedy would be retroactive and would no longer serve the purpose of compelling compliance.

Furthermore, "[c]ontempt is generally a tool used where a party's violation is willful." Obolensky v. Trombley, 2015 VT 34, ¶ 42, 198 Vt. 401 (citation omitted); *see also* Andrews v. Andrews, 134 Vt. 47, 49 (1975) ("Civil contempt can be found where a party, though able, refuses to comply with a valid, specific court order."). A finding of contempt, particularly in the context of summary judgment, is inappropriate here because it appears that Costco followed the normal course and consulted with the proper zoning authorities before operating. The context of this matter, a de novo municipal zoning appeal from 2015, is important. In de novo zoning appeals, this Court sits in the shoes of the DRB, thus its decisions are made in place of the DRB. This Court's 2015 Decision approving Costco's Municipal Permit was effectively a municipal approval, which is why the Court remanded to the Town for the limited purpose of issuing a zoning permit consistent with the Court's decision. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec at 51 (Aug. 27, 2015). In this way, the

permit on record at the Town, with the terms and conditions initially imposed by the DRB, should have been updated or modified to reflect the 2015 Decision.

It seems that two factors have now combined to create significant confusion and dispute: first, the Court's 2015 Decision accepted Costco's agreement to complete the MVD Improvements before operating the gas station – but did not lay out with great clarity the requirements and parameters of the approval, or purport to modify Condition 11(b) of the initial DRB approval.[4] And second, it does not appear that the Town ever undertook the process of issuing a new permit consistent with the 2015 Decision. Thus, it is apparent that Costco's obligations under its existing Municipal Permit have not been clearly expressed.

When Costco sought to open its gas station for limited hours, prior to the completion of the MVD Improvements, it sent a letter to the Zoning Administrator describing its proposal, attached a zoning application, and requested a determination as to whether its proposal would require a permit amendment. The Zoning Administrator responded with a letter that, while not a model of clarity, could be reasonably read as a determination that no permit amendment was necessary. Thereafter, Costco began operating the gas station for limited hours. The Town did not issue a Notice of Violation. At the same time, Costco pursued its application for a permit amendment at the DRB – purportedly as an additional measure of authorization.

Costco's actions indicate that it intended to follow the municipal zoning process and ensure that its activities were authorized. It is the Town, not this Court, that has the primary responsibility and authority for zoning enforcement. *See* 24 V.S.A. § 4452 ("If any . . . land is . . . used in violation of any bylaw . . . the administrative officer shall institute in the name of the municipality any appropriate action . . . ."). Pursuant to 24 V.S.A. § 4448(a), the Zoning Administrator "shall administer the bylaws literally and shall have not have the power to permit any land development that is not in conformance with those bylaws." A violation of the terms and conditions of a municipal permit, whether issued by the DRB or this Court, is considered a violation of the bylaws. *See* In re Minor Subdivision Plot Approval No. 88-340, 156 Vt. 199, 202 (1991) ("A violation of a condition of a subdivision permit would be a violation of the zoning ordinance itself."). It is therefore entirely reasonable that Costco would consult with the Town prior to operating the gas station, to ascertain whether its proposal was authorized by its existing permit.

[4] In fact, Condition 11(b), relating to the MVD Improvements, was not part of the appeal.

Vallee cites our decision in R.L. Vallee Determination Request, arguing that the Zoning Administrator's determination was an advisory opinion with no legal weight, and therefore Costco could not rely on it. *See* R.L. Vallee Determination Request, No. 109-9-19 Vtec (Vt. Super. Ct. Envtl. Div. May 12, 2020) (Durkin, J.). In that case, Vallee asked the Zoning Administrator to determine that "Costco must apply for and obtain an amendment to the Final Plat and Site Plan approval . . . prior to Costco opening it's fueling station for limited hours." Id. at 2 (quotation omitted). The request was made in anticipation of a future proposal: at the time, Costco had not submitted any proposal to the Town. *See* id. at 4–5. When the Zoning Administrator rejected Vallee's request and rejected its attempt to appeal to the DRB, Vallee appealed to this Court. Id. at 2. Our decision dismissing that appeal noted that Vallee was requesting an advisory opinion concerning a hypothetical land use on Costco's property, and that "Costco had not opened its gas station, proposed to open its gas station, or applied for any approval to do so." Id. at 6. In any event, the Court was without jurisdiction to hear the appeal because there was no decision of the appropriate municipal panel, the DRB, to appeal from. *See* id. at 7–8.

The circumstances here are much different. Costco presented a concrete proposal to the Zoning Administrator, along with a zoning application, and sought guidance as to whether its proposed operations required a permit amendment. Costco received guidance reasonably indicating that no amendment was needed, and never received a Notice of Violation.[5] Though the Zoning Administrator's communications may have been advisory in nature, the question here is whether Costco willfully violated the terms of its existing approval as set forth in the Court's 2015 Decision. In light of the ambiguity surrounding the existing approval and Costco's good faith efforts to ascertain the bounds of its authorization, we cannot conclude that there was a willful violation. Therefore, we will not hold Costco in contempt. *See* Sanfacon NOV, Nos. 48-4-12 Vtec and 183-12-12 Vtec at 2 (June 23, 2015); Obolensky, 2015 VT 34, ¶ 42. Vallee's post-judgment motion for summary judgment

[5] As was the case in R.L. Vallee Determination Request, here the Zoning Administrator rejected Vallee's attempts to appeal her guidance letters to the DRB. The letters here were framed as determinations of the Zoning Administrator, and informed Costco of a right to appeal pursuant to 24 V.S.A. § 4465. Despite informing Costco of a right to appeal, the Zoning Administrator's response rejecting Vallee's appeal took the position that the letters did not represent appealable decisions or acts. As no appeal has come before this Court, we have not had occasion to consider any substantive issues with respect to the letters – including whether they should be treated as decisions or acts of the Zoning Administrator. *See* 24 V.S.A. § 4465(a). Nor is it within our jurisdiction to embark on that analysis in this matter.

We observe, as we did in R.L. Vallee Determination Request, that the Town's procedures and seemingly contradictory positions are concerning. Vallee's frustration is apparent and justified to some extent. Yet, it is important to note that Vallee's quarrel with respect to these issues does not lie with Costco.

in Docket No. 104-8-12 Vtec is hereby **DENIED.** We now turn to the second matter before the Court: the Site Plan Amendment Appeal.

II. Docket No. 48-6-20 Vtec

This de novo appeal arises from the DRB's June 22, 2020, decision approving Costco's site plan amendment request and authorizing the operation of Costco's gas station for limited hours until the MVD Improvements are completed. Vallee's motion for summary judgment seeks: (1) a declaration that Costco requires a permit amendment to operate its gas station before the completion of the MVD Improvements, (2) enforce and sanctions for unpermitted operations during an automatic stay, (3) a remand of Costco's amendment application 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. We address each issue in turn.

a. Whether a Permit Amendment is Required

Vallee appears to seek summary judgment on its Question 1, which asks: "Does [Costco] require a Permit Amendment to the Final Plat and Site Plan Permit issued by this Court in *In re Costco Final Plat & Site Plan Amendment Appeal*, No. 104-8-12 Vtec (Vt. Super. Ct. Envtl. Div. Aug. 27, 2015) in order to operate it's fueling station for limited hours in advance of the completion of [the MVD Improvements]?" *See* Vallee's Statement of Questions, filed July 22, 2020. The Question is unusual: in the context of this de novo proceeding to review Costco's permit amendment application, Vallee appears to ask about the propriety of Costco's operations under the terms of a preexisting permit.

The Environmental Division is a Court of limited appellate jurisdiction; our authority is narrowly defined. Here, the scope of our subject matter jurisdiction, and our review, is confined to those issues the municipal panel below addressed or had the authority to address when considering the original application. *See, e.g.*, In re Torres, 154 Vt. 233, 235 (1990). ("The reach of the superior court in zoning appeals is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader."). Thus, the scope of our review is limited to the application before us. *See* Northern Vermont Rentals, LLC Extension, No. 5-1-17 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Nov. 02, 2017) (Walsh, J.) ("We hear appeals from permit application decisions de novo, sitting in the place of the decision-making body below . . . and determine whether the application should be approved."); Wolcott SD Final Plat Denial, No. 57-8-20 Vtec, slip op. at 4 (Vt. Super. Ct. Envtl. Div. Mar. 4, 2021) (Walsh, J.) (concluding that certain questions were outside the scope of review because they did not relate to the subdivision application before the Court). In this case, our

review of the amendment application undoubtedly includes questions asking whether the amendment is permissible, and whether the amendment complies with the relevant municipal regulations. However, as this is not an enforcement action, we do not see how our limited scope of review extends to a conclusive determination regarding Costco's operations under its existing permit.

While we cannot opine as to matters outside this Site Plan Amendment Appeal, we find that Question 1 can be read in a manner consistent with our jurisdictional limitations. Thus, we interpret Question 1 to ask whether Costco's amendment application seeks to modify the terms and conditions of the existing Municipal Permit approved by this Court in Costco Final Plat & Site Plan, No. 104-8-12 Vtec (Aug. 27, 2015). For purposes of evaluating the amendment application, we observe that Costco proposes to operate its gas station for limited hours until the MVD Improvements are completed. Costco's preexisting Municipal Permit contemplates full-time operations and incorporates Costco's agreement to wait until the MVD Improvements are complete before commencing those operations. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec at 2–4 (Aug. 27, 2015). As such, Costco is proposing to modify the terms of the Municipal Permit approved by this Court's 2015 Decision. Vallee's motion is therefore **GRANTED** as to Question 1, to the extent our jurisdiction allows. Question 1, as interpreted above, is answered in the affirmative.

b. Request for Enforcement and Sanctions

Vallee's motion also requests enforcement and sanctions for allegedly unpermitted operations by Costco. Costco has been operating its gas station for limited hours since May 26, 2020. On June 22, 2020, Costco received its permit amendment from the DRB to operate for limited hours. Pursuant to § 4449(a)(3), "[n]o permit issued pursuant to this section shall take effect until the time for appeal in section 4465 of this title has passed, or in the event that a notice of appeal is properly filed, no such permit shall take effect until adjudication of that appeal by the appropriate municipal panel is complete and the time for taking an appeal to the Environmental Division has passed without an appeal being taken." On June 26, 2020, the DRB's decision was appealed to this Court. Thus, Vallee asserts that Costco's permit amendment was ineffective from June 22 to June 26 while the appeal period was running. Vallee further asserts that Costco's permit amendment was ineffective for 15 days after June 26, due to an automatic stay. *See* 24 V.S.A. § 4449(a)(3) ("If an appeal is taken to the Environmental Division, no permit shall take effect until the [Court] rules . . . on whether to issue a stay, or the expiration of 15 days, whichever comes first."); and V.R.E.C.P. 5(e) ("[T]he permit shall not take effect until the earlier of 14 days from the date of filing of the notice of appeal or the date of a ruling by the

court under this subdivision on whether to issue a stay."). In essence, Vallee contends that Costco operated its gas station illegally for 46 days from May 26, 2020, until July 11, 2020.

Vallee's initial motion for enforcement and sanctions sought to enjoin operations at the gas station for 47 days, representing the entire span of Costco's operations up the time its permit amendment became effective. Now however, it appears that Vallee requests sanctions in the form of a 19-day injunction representing the time from June 22 to July 11 between the grant of Costco's permit amendment and when it became effective under 24 V.S.A. § 4449(a)(3) and V.R.E.C.P. 5(e). This apparent change may reflect the fact that we have no authority, in the context of this appeal, to consider events prior to the decision appealed from: the DRB's June 22, 2020, approval of Costco's amendment application.

Costco argues that Vallee has not cited any authority which would allow the Court to issue sanctions for alleged zoning violations in this Site Plan Amendment Appeal. For its part, Vallee contends that it is not seeking sanctions for zoning violations, but rather for violations of the statutory and procedural rules requiring an automatic stay of Costco's permit amendment. Though we recognize the distinction Vallee is attempting to make, its argument is based on the premise that Costco's operations were illegal until the permit amendment it acquired on June 22, 2020, became effective. This in turn assumes that Costco's operations were in violation of its existing Municipal Permit. As this is a zoning appeal and not an enforcement action, it is not within our jurisdiction to make that determination here. *See* 24 V.S.A. § 4452 (stating that municipalities may initiate an enforcement action to "prevent, restrain, correct, or abate . . . any act . . . constituting a violation."); id. § 4451(a) ("No action may be brought under this section unless the alleged offender has had at least seven days' warning notice by certified mail."). For that reason, and because Vallee has not cited any authority which would allow the Court to impose the requested sanctions, we conclude that Vallee has not demonstrated that it is entitled to judgment as a matter of law on its enforcement and sanctions requests. We therefore **DENY** Vallee's motion as to this issue.

c. Request for Remand

The next issue raised in Vallee's motion is whether this matter should be remanded to the DRB for further consideration. Vallee argues that a remand is required, because the DRB failed to undertake the necessary Hildebrand/Stowe Club Highlands analysis for permit amendment requests. Costco asserts that a remand is neither necessary nor appropriate under the circumstances. While this

Court has discretion to remand back to the DRB, we agree that the procedural ping-pong match that it resembles is not warranted here.

Vallee points to In re Torres for the proposition that remand is required. *See* In re Torres, 154 Vt. 233 (1990). In that case, applicants applied for a "home occupation" permit, which was a permitted use in the zoning district. Id. at 233–34. The zoning board approved the application, and then the approval was appealed to the Superior Court. Id. at 235. On appeal, the Superior Court concluded that the applicants' proposed use was not in fact a "home occupation" under the relevant bylaws. Id. Nonetheless, the Superior Court then allowed the applicants to change their application from one for a home occupation permit into one for conditional use approval, and then proceeded to review and grant the new application. Id. The Vermont Supreme Court held that neither the zoning board nor the Superior Court had "the power to convert a hearing on a permitted use application into a hearing on a conditional use permit" simply by allowing applicants to change the nature of their application without prior public notice and review by the municipal panel below. *See* id. at 236. Thus, the Superior Court should have remanded to the zoning board for a hearing on the new conditional use application in the first instance. *See* id.

The key guidance of Torres is that "whatever the zoning board of adjustment or the planning commission might have done with an application properly before it, the superior court may also do if an appeal is duly perfected. *See* id.; *see also* In re Maple Tree Place, 156 Vt. 494, 500 (1991) ("[T]he superior court is limited to consideration of the matters properly warned as before the local board."). Here, the application that was heard and considered by the DRB is now before this Court. Costco's permit amendment application has not changed. The issue addressed by the Hildebrand analysis, namely whether the applicant is entitled to seek an amendment, is intrinsic to the amendment application itself.[6] Thus, the issue was properly before the DRB. This is not a case where the Court is asked to "address[] new issues never presented to the [DRB] and on which interested persons have not spoken." *See* Maple Tree Place, 156 Vt. at 500. The question is not whether the DRB actually conducted a proper analysis, but whether it had the opportunity to do so. *See* Torres, 154 Vt. at 236 (noting that the Superior Court can do whatever the municipal panel "*might have done* with an application properly before it") (emphasis added). Indeed, in de novo appeals such as this we generally do not consider the propriety of the decision below. *See* Chioffi v. Winooski Zoning Bd., 151 Vt. 9,

[6] We note that the same can be said of the successive application doctrine.

11 (1989) (quoting In re Poole, 136 Vt. 242, 245 (1978)) ("A de novo trial 'is one where the case is heard as though no action whatever has been held prior thereto.'").

For the reasons above, we conclude that the Court may properly consider Costco's amendment request without remanding to the DRB. Our conclusion is bolstered by the realization that "given the history of this litigation, it [is] certain that [the Court will] be called upon to ultimately make the necessary legal determinations" whether the matter is remanded or not. *See* In re Sisters & Bros. Inv. Grp., LLP, 2009 VT 58, ¶ 14, 186 Vt. 103. Vallee's motion is therefore **DENIED** as to the request for remand.

d. Whether Costco is Estopped or Barred from Seeking an Amendment

Vallee's argues that Costco is estopped, precluded, or otherwise barred from seeking an amendment under the principles of collateral attack;[7] the successive application doctrine and judicial estoppel;[8] and the Hildebrand analysis.[9] Costco has cross-moved on the Hildebrand issue. Vallee's motion incorporates arguments from its separate motion for summary judgment in Docket No. 20-3-20 Vtec: a related Act 250 matter. We begin by considering whether Costco's application is an impermissible collateral attack.

i. Collateral Attack

Where a municipal land use decision has become final, 24 V.S.A. § 4472(a) and § 4472(d) operate to preclude any challenge to that decision or its conditions, "either directly or indirectly," in any other proceeding. *See* 24 V.S.A § 4472(d); In re Hopkins Certificate of Compliance, 2020 VT 47, ¶ 8. However, it is also true that "although . . . original conditions may no longer be challenged, they may be *amended* in appropriate circumstances." *See* In re Hildebrand, 2007 VT 5, ¶ 12, 181 Vt. 568 (citing Stowe Club Highlands, 166 Vt. 33 (1996)) (emphasis added). Vallee argues that Costco's amendment application represents an impermissible collateral attack on the final and binding Municipal Permit approved by this Court in 2015. Offering little in the way of explanation, Vallee

[7] Vallee's Question 3 asks: "Is Costco's permit amendment request an impermissible collateral attack on final and binding permit conditions, and or this Court's [2015] order, which it did not originally appeal? *See* Vallee's Statement of Questions.

[8] Vallee's Question 2 asks: "Is Costco's requested permit amendment barred by the 'successive application' doctrine to the extent the doctrine is a separate analysis in the consideration of Costco's application for permit amendment of its Final Plat and Site Plan permits?" *See* id.

[9] Vallee's Question 4 asks: "Does the requested permit amendment satisfy the standard set by the Vermont Supreme Court in *In re Stowe Club Highlands, 166 Vt. 33 (1996)* and as applied to municipal permits by th[e] Court in *In re Hildebrand*, 2007 VT 5, ¶ 7, 181 Vt. 568, 569–70, 917 A.2d 478, 481 (2007)?" *See* id. This Question also includes several related sub-parts.

asserts that Costco is attempting to challenge the determination, incorporated in its existing Municipal Permit, that the MVD Improvements must be complete before operating the gas station. While we agree that Costco is seeking to modify its existing permit, in that it proposes to operate during limited hours until the MVD Improvements are complete, its proposal does not represent an impermissible collateral attack.

Costco is not challenging the necessity of the MVD Improvements to mitigate the impacts they were intended to address. The improvements were considered and accepted in the context of a proposal for full-time operations. An analysis based on peak traffic hours served as the foundation for the findings of the Commission and this Court. Costco now proposes to operate at different hours, particularly off-peak hours, and a different proposal necessarily creates different impacts. As this proposal was not contemplated in prior proceedings, it will require a new analysis. This is not a collateral attack: it is an amendment proposal. *See* Hildebrand, 2007 VT 5, ¶ 12. We therefore conclude that Costco's amendment application is not an impermissible collateral attack on its existing Municipal Permit. Vallee's motion is **DENIED** as to this issue, and Vallee's Question 3 is answered in the negative. *See* Vallee's Statement of Questions.

ii. Successive Application Doctrine

The successive application doctrine adapts the principles of claim preclusion to the specific context of multiple land use applications, prohibiting "a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions has occurred or other considerations materially affecting the merits of the request have intervened between the first and second application." *See* Application of Carrier, 155 Vt. 152, 158 (1990) (quotation omitted). This doctrine attempts to strike the proper balance between finality and flexibility. *See* In re Dunkin Donuts S.P. Approval (Montpelier), 2008 VT 139, ¶ 9, 185 Vt. 583. It is governed by 24 V.S.A. § 4472(d), which insulates any decision or act of the DRB from collateral attack, but "carves an exception out of the otherwise rigid standard of preclusion of § 4472(d) to allow local boards the ability to respond to changing circumstances that often arise in zoning decisions." In re Lathrop Ltd P'ship I, 2015 VT 49, ¶ 58, 199 Vt. 19 (citations omitted). Vallee contends that Costco's amendment application should be barred by the successive application doctrine. Costco argues that the Hildebrand analysis governs, and in any case the successive application doctrine is satisfied.

The Vermont Supreme Court, in In re Application of Lathrop, has set forth a clear process for evaluating claim and issue preclusion concerns in the context of municipal zoning cases. *See*

Lathrop, 2015 VT 49, ¶¶ 59, 66 (indicating that the Hildebrand amendment analysis is an application of issue preclusion, while the successive application doctrine is an application of claim preclusion). As explained in Lathrop, it does not matter "whether the applicant submits a new application or requests an amendment to an existing permit." *See* id. at ¶ 66. Regardless of whether the application is one for amendment, or whether the prior application was approved with conditions or denied, both the successive application doctrine and Hildebrand analysis may come into play:

> The first step is to determine whether there is a judgment with preclusive effect. If so, the second step should be review of the proposal as a whole. If the board or court concludes that there is a substantial change from the permitted project, review should proceed as if there is no prior permit. In the relaxed environment of zoning permits, it is not determinative that the applicant could have or should have made the new proposal at the time of the original permit review. The third step is that conducted for permit amendments. To the extent the applicant seeks to change or avoid permit restrictions or conditions, the applicant must meet the standards for permit amendments as set forth in *Hildebrand* in light of the new project and any restrictions and conditions imposed from the second step.

See id. at ¶¶ 63, 66 (noting that a decision approving a project subject to certain requirements "could have been expressed either as a *denial* of a permit until certain conditions are met or as an *approval* of a permit so long as certain conditions are met").

Looking at the first step, there is a judgment with preclusive effect as specified in 24 V.S.A. § 4472(d): the existing Municipal Permit approved by this Court's 2015 Decision is final and binding. *See* Costco Final Plat & Site Plan, No. 104-8-12 Vtec at 37–39 (Aug. 27, 2015) (concluding that the MVD Improvements would "fully mitigate" the traffic impacts of the proposal and accepting Costco's agreement to await the completion of the improvements before operating). Looking at the second step, which applies the successive application doctrine, the proposed project differs from the original project in one significant way. Costco has reduced its proposed hours of operation by approximately 21.5 percent. The potential impact of this reduction is even more significant than the percentage suggests, since the operational hours that have been cut out include peak traffic hours. The prior application, and existing Municipal Permit, contemplates full-time operations, including operation during the peak traffic hours. The MVD Improvements were identified, and later accepted by this Court, upon reviewing an analysis based on peak traffic hours. These peak hours are now among the hours during which the gas station will be closed under the new proposal. Thus, we conclude that there is a sufficiently substantial change in the application, and that the change is directly responsive to the analysis underpinning the existing permit's reliance on the MVD Improvements. *See*

Lathrop, 2015 VT 49, ¶ 58 ("The second application can be granted when the application has been substantially changed so as to respond to objections raised in the original application . . . ."); *see also* Carrier, 155 Vt. at 158 (citing examples of sufficient changes).

It follows that Costco's amendment application is not barred by the successive application doctrine. *See* Lathrop, 2015 VT 49, ¶ 58, 66. This matter should now proceed to the merits, as is proper for any application that satisfies the doctrine.[10] *See* id. ¶ 66 ("If the board or court concludes that there is a substantial change from the permitted project, review should proceed as if there is no prior permit."). However, the application also seeks to modify the terms of the existing Municipal Permit, and the requirements of that permit cannot be changed unless Costco can satisfy the Hildebrand analysis for permit amendments. *See* id. (noting that the third step is for permit amendments, and an applicant seeking to change permit requirements must satisfy Hildebrand).

As we have concluded that Costco's application is not barred by the successive application doctrine, Vallee's motion is hereby **DENIED** as to that issue. Vallee's Question 2 is answered in the negative.

iii. Hildebrand Analysis

Both Vallee and Costco have moved for summary judgment on the question of whether Costco can satisfy the Hildebrand analysis for permit amendments. In cases like this however, the Vermont Supreme Court's decision in Lathrop dictates that the Hildebrand analysis should be conducted only after the application is reviewed on the merits and any terms or conditions necessitated by the new proposal have been identified. *See* Lathrop, 2015 VT 49, ¶¶ 66, 69. For this reason, we conclude that an analysis under Hildebrand is premature at this stage. Costco and Vallee's motions for summary judgment on this topic are therefore **DENIED**. If the application is ultimately approved, the Court will consider this issue and Vallee's Question 4 in conjunction with its decision on the merits.

[10] Vallee makes an unsupported argument that the doctrine of judicial estoppel is inherent to the considerations under the successive application doctrine and should be applied here. Vallee contends that Costco has directly contradicted its prior representations to the Court regarding the MVD Improvements and should not be allowed to change course. The Vermont Supreme Court has not decided whether to adopt judicial estoppel, nor is the Court aware of any application of the doctrine in Vermont, in the land use context. *See, e.g.*, Gallipo v. City of Rutland, 173 Vt. 223, 237 (2001); Laberge Shooting Range JO, No. 96-8-16 Vtec, slip op. at 18–19 (Vt. Super. Ct. Envtl. Div. Aug. 15, 2017) (Walsh, J.) (declining to apply judicial estoppel). We decline to unilaterally adopt and apply judicial estoppel here. Furthermore, the Vermont Supreme Court has indicated in In re Dunkin Donuts that an applicant may pursue an amendment to relieve itself of promises to the Court and other parties. *See* In re Dunkin Donuts S.P. Approval (Montpelier), 2008 VT 139, ¶ 12, 185 Vt. 583.

Conclusion

For the foregoing reasons, we conclude that a post-judgment finding of contempt is not appropriate with respect to this Court's Decision on the Merits in Costco Final Plat & Site Plan, No. 104-8-12 Vtec. In Docket No. 48-6-20 Vtec, we conclude that Costco's permit amendment application is seeking to modify the terms and conditions of the existing permit approved by this Court in Costco Final Plat & Site Plan, No. 104-8-12 Vtec. Vallee has not demonstrated that the Court has the jurisdiction or authority in the context of a permit amendment appeal to issue sanctions in connection with Costco's operations from June 22, 2020, to July 11, 2020. A remand to the DRB is not warranted in this matter. Costco's amendment application is not an impermissible collateral attack. The application is not barred by the successive application doctrine. Finally, it would be premature to consider Costco's amendment request under the Hildebrand analysis at this time.

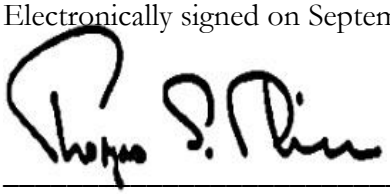
Therefore, Vallee's motion for summary judgment is **DENIED** with respect to Docket No. 104-8-12 Vtec. The motion is **DENIED** in part and **GRANTED** in part with respect to Docket No. 48-6-20 Vtec. Costco's motion for summary judgment in Docket No. 48-6-20 Vtec is **DENIED.**

Vallee's Question 1 is interpreted, in a manner consistent with our jurisdictional limitations, to ask whether Costco's amendment application seeks to modify the terms of the existing Municipal Permit approved by this Court in Costco Final Plat & Site Plan, No. 104-8-12 Vtec (Aug. 27, 2015). *See* Vallee's Statement of Questions. Under this interpretation, Question 1 is answered in the affirmative. Vallee's Questions 2 and 3 are answered in the negative. *See* id.

This matter will proceed to the merits, and Vallee's Questions 4–6 remain before the Court.[11]

The Court Operations Manager will set these appeals and the related Act 250 appeal for a final pre-trial status conference within the next 45 days, so as to give the parties and their legal counsel sufficient time to digest the Court's rulings.

Electronically signed on September 2, 2021, at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division

[11] As Timberlake's Questions in the Site Plan Amendment Appeal, Docket No. 48-6-20 Vtec, are identical to Vallee's, they are all answered in the same fashion and the same Questions remain before the Court. *See* Timberlake's Statement of Questions, filed July 30, 2020.