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

Costco Land Use Act 250 Permit Amendment

DECISION ON MOTIONS

R.L. Vallee, Inc. ("Vallee") and Timberlake Associates, LLP ("Timberlake") appeal Amended Act 250 Land Use Permit #4C0288-19F issued by the District #4 Environmental Commission to Costco Wholesale Corporation ("Costco"), approving Costco's application to amend Land Use Permit #4C0288-19C and authorizing the operation, for limited hours, of Costco's gasoline fueling station at its property on Lower Mountain View Drive in Colchester Vermont. Costco has filed a cross-appeal. Vallee is represented in this matter by Alexander J. LaRosa, Esq., 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 this appeal pursuant to 10 V.S.A. § 8504(n)(3) and is represented by Evan P. Meenan, Esq.

Presently before the Court are motions for summary judgment filed by Costco and Vallee.[1] The NRB has responded to both motions.

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), made applicable through V.R.E.C.P. 5(a)(2). We accept as true all of the nonmovant's allegations of fact, as

[1] Costco's motion was filed both in this Act 250 appeal (No. 20-3-20 Vtec) and in Costco Wholesale Corp Site Plan Amendment, No. 48-6-20 Vtec: a related municipal zoning appeal. The motion appears to seek summary judgment in both matters. This decision addresses Costco's motion only to the extent that it relates to the Act 250 appeal, and a separate decision will address the municipal matter.

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 factual 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 2012, Costco submitted Act 250 permit amendment application #4C0288-19C seeking approval for various expansions including a gas station at its property located on Lower Mountain Drive and Hercules Drive in Colchester, Vermont.

2. On January 24, 2013, the District #4 Environmental Commission ("Commission") issued Land Use Permit #4C0288-19C ("Permit -19C"), with conditions. As relevant here, Permit -19C authorized Costco to "construct a three-island (12 fueling positions) Costco Gasoline fuel station" ("gas station"). *See* Land Use Permit #4C0288-19C, at 1 (Dist. #4 Envtl. Comm. Jan. 24, 2013). The permit contemplated full-time operation of the gas station.

3. Condition 29 of Permit -19C requires Costco to construct or fund the construction of certain traffic mitigation measures and improvements ("MVD Improvements"). The required MVD Improvements are centered around the intersection of Upper/Lower Mountain View Drives and Routes 2/7, in the vicinity of the I-89 Exit 16 in Colchester. Pursuant to Condition 29, Costco may not operate its gas station until the MVD Improvements are complete. *See* id. at ¶ 29.

4. The MVD Improvements were identified to mitigate the traffic impacts of the proposed fully-operating gas station, based on an analysis of the highest hourly traffic flows on weekdays: the weekday PM peak hours.

5. 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.

6. In approving Permit -19C, the Commission relayed the following findings concerning the interplay between Costco's gas station, proposed traffic mitigation, existing Exit 16 corridor issues, and the DDI project: "since an extensive redesign of the area is needed, the area has been extensively studied, a solution has been chosen and designed, a funding source has been identified, the [proposed gas station] is located in an already highly developed commercial/industrial area, and the state has demonstrated a strong intent to complete the [DDI project] in the very near future, . . . mitigation need not resolve the entire [Exit 16 corridor traffic] problem before operation. . . ."

7. 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.

8. Together with Timberlake Associates, LLP ("Timberlake"), Vallee appealed the Permit -19C to this Court along with "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 Act 250, No. 41-4-13 Vtec"].

9. When the appeal of Costco's Permit -19C was heard on the merits, VTrans had already begun pursuing separate permits for the DDI project: it submitted an Act 250 application for the project in late 2013. *See* Costco Act 250, No. 41-4-13 Vtec at 6 (Aug. 27, 2015).

10. Traffic impacts under Act 250 Criteria 5 and 9(K) were among the central issues in the Permit -19C appeal. No party appealed Condition 29 requiring the implementation of 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 7, 15.

11. 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.

12. 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).

13. Instead, the Court accepted Costco's proposed mitigation: the MVD Improvements which had been required by the Commission through Condition 29. The Court concluded that the MVD Improvements would "fully mitigate" any traffic impacts contributed by Costco's improvements, and Costco agreed that it would not occupy or operate the proposed gas station until the MVD Improvements were completed. *See* id. at 45.

14. 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. In keeping with Condition 29 imposed by the Commission, the Court acknowledged that Costco could either wait for VTrans to complete the MVD Improvements or construct them itself. *See* id. at 8, 14.

15. Ultimately, the Court approved Permit -19C subject to the unappealed terms and conditions imposed by the Commission, which included the MVD Improvements set forth in Condition 29. *See* id. at 13–14, 45, 51

16. Vallee and Timberlake subsequently appealed to the Vermont Supreme Court. In 2016, the Supreme Court affirmed this Court's conclusion that the MVD Improvements were sufficient 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.

17. In November of 2016, VTrans received the necessary Act 250 permits for the DDI project. *See* Land Use Permit # 4C1271, Findings of Fact, Conclusions of Law, and Order (Dist. #4 Envtl. Comm. Nov. 28, 2016).

18. Vallee and Timberlake appealed those permits 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.).

19. 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 this Court on this issue of compliance with Act 250 Criterion 1 (undue water pollution). In re Diverging Diamond Interchange SW Permit, 2019 VT 57, ¶ 1, 210 Vt. 577.

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

21. 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.

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

23. The lands necessary to construct the MVD Improvements, including lands over which Vallee has an easement, have not been acquired by VTrans.

24. 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.).

25. 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.

26. The condemnation case is ongoing.

27. It is not certain when the MVD Improvements or the full DDI project will be constructed. The still pending litigation suggests that the commencement of construction may years away, or may not occur if any of Valley and Timberlake's pending objections prove successful.

28. At least the following additional matters have been or are being litigated concerning various aspects of Costco's gas station project or the VTrans' DDI project: Costco Act 250 Permit Amend JO, No. 157-12-16 Vtec (Vt. Super. Ct. Envtl. Div. Dec. 8, 2017) (Durkin, J.); Costco Act 250 Permit Amend JO, No. 157-12-16 Vtec (Vt. Super. Ct. Envtl. Div. July 29, 2016) (Durkin, J.); R.L. Vallee, Inc. v. Vermont Agency of Transp., No. 5:18-CV-104, 2020 WL 4689788 (D. Vt. July 8, 2020); R.L. Vallee Determination Request, No. 109-9-19 Vtec (Vt. Super. Ct. Envtl. Div. May 12, 2020) (Durkin, J.); and Costco Wholesale Corp. Site Plan Approval, No. 48-6-20 Vtec (Vt. Super Ct. Envtl. Div.) (Durkin, J.)

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

30. Costco's 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.

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

32. The application does 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.

33. 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). This appeal followed.

Discussion

This *de novo* Act 250 appeal concerns Costco's -19F Amendment application. Costco and Vallee cross-move for summary judgment on the question of whether the application is barred by Act 250 Rule 34(E) and the Stowe Club Highlands analysis for permit amendments.[2] Costco contends that its application, seeking to alter Condition 29 of Permit -19C, is not barred and that the application offers a pragmatic and temporary path forward in the face of unanticipated circumstances. Vallee argues that Rule 34(E) cannot be satisfied and therefore Costco is precluded from seeking an amendment. Vallee's motion for summary judgment also raises additional preclusion issues under the successive application and collateral attack doctrines.[3] The NRB has responded to both motions, unequivocally supporting the proposition that the -19F Amendment application is not precluded and

[2] 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. We regard these sub-parts as superfluous legal argument on the issues the Court must consider under Rule 34(E). To the extent the sub-parts of Question 3 point to relevant factors, our answers are incorporated into the Rule 34(E) analysis and our overall conclusion.

[3] Joint Question 1 asks: "Is [Costco's] requested permit amendment barred by the 'successive application' doctrine to the extent the doctrine is a separate analysis in [an] application for an Act 250 permit amendment?" Id. Joint Question 2 asks whether "Costco's permit amendment request [is] an impermissible collateral attack on a final and binding permit condition that it did not originally appeal to this Court." *See* id.

that this matter should proceed to the merits of the application. We first address the issue common to both motions before the Court: whether Costco is entitled to seek an amendment under Rule 34(E).

I. Rule 34(E), Stowe Club Highlands Analysis

Where a final and binding Act 250 permit has been issued, in this case Permit -19C, it may be amended only under certain circumstances. Act 250 Rule 34(E) codifies the Vermont Supreme Court's analysis in In re Stowe Club Highlands, which may preclude an applicant from amending conditions in a final permit.[4] 166 Vt. 33, 38–40 (1996); Act 250 Rules, Rule 34(E). This limitation reflects the need to "weigh[] the competing values of flexibility and finality in the permitting process." *See* In re Waterfront Park Act 250 Amend., 2016 VT 39, ¶ 11, 201 Vt. 596 (quoting Stowe Club Highlands, 166 Vt. at 38 (1996)). The approval of an Act 250 permit should not serve as a mere "prologue to continued applications for permit amendments," yet it is not practical to consider every permit "carved in stone." *See* Waterfront Park Act 250 Amend., No. 138-9-14 Vtec, slip op. at 5–6 (Vt. Super. Ct. Envtl. Div. May 8, 2015) (Walsh, J.) (quotations omitted), *aff'd*, 2016 VT 39.

Determining whether an amendment is justified requires a two-step analysis. At the first step, the district commission, or this Court on appeal, must determine "whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit. This determination shall be made on a case-by-case basis." Act 250 Rules, Rule 34(E)(1). If the condition was not included to resolve a critical issue, then the applicant is entitled to seek an amendment. Id. at Rule 34(E)(1)(a). If, however, the condition was critical to the issuance of the

[4] The NRB raises the possibility that Rule 34(E) may not apply to the -19F Amendment application at all, because it could be said that the application does not amend Condition 29 so much as alter the timeline for its implementation. *See* Re: Haystack Highlands, LLC, No. 700002-10D-EB, Memorandum of Decision, slip op. at 3 (Vt. Envtl. Bd. Dec. 20, 2002) ("[T]he [Stowe Club Highlands] analysis does not apply when a permittee is seeking an amendment which does not release it from a permit condition in order to realize an advantage under the Criteria of Act 250."). As noted by the NRB, Costco is not seeking full relief from Condition 29: under the -19F Amendment; Costco would remain committed to and bound by the requirement that the MVD Improvements be constructed prior to operating the gas station on a full-time basis. We also recognize that the limited hours proposed for the -19F Amendment would reduce, not expand, the full-time operating hours already authorized under Permit -19C. *See* Re: Home Depot USA, Inc., No. 1R0048-12-EB, Memorandum of Decision, slip op. at 11-12 (Vt. Envtl. Bd. Nov. 30, 2000) ("Here . . . Permittees are not seeking to amend the permit to relieve them of any permit conditions in order to realize a gain.").

Nonetheless, the undisputed facts and the plain language of Condition 29 itself lead us to conclude that Costco is seeking to amend the Condition. As relevant here, Condition 29 states: "Construction of the [MVD Improvements] shall be made prior to . . . utilization of the gas fueling station[]. . . ." Land Use Permit #4C0288-19C, at ¶ 29 (Dist. #4 Envtl. Comm. Jan. 24, 2013). Though Costco remains committed to the eventual implementation of the MVD Improvements and proposes reduced hours in the interim, it does seek to "utilize" the gas station prior to the completion of the improvements. Thus, the application entails a modification of Condition 29, and that modification must satisfy Rule 34(E). We note that both Costco and Vallee appear to assume the same.

permit, we proceed to the second step and determine whether the balance of several enumerated factors weighs in favor of flexibility or finality:

> In balancing flexibility against finality, the District Commission shall consider the following, among other relevant factors:
>
> (a) changes in facts, law, or regulations beyond the permittee's control;
>
> (b) changes in technology, construction, or operations which necessitate the amendment;
>
> (c) other factors including innovative or alternative design which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition;
>
> (d) other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans;
>
> (e) manifest error on the part of the District Commission, the environmental board, or the environmental court in the issuance of the permit condition; and
>
> (f) the degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by any party, the District Commission, the environmental board, the environmental court, or any other person who has a particularized interest protected by 10 V.S.A. Ch. 151 that may be affected by the proposed amendment.
>
> (g) whether the applicant is merely seeking to relitigate the permit condition or to undermine its purpose and intent.

Id. at Rules 34(E)(2), (3)(a)–(g).[5] If the need for flexibility outweighs the need for finality, then the amendment application is not precluded by Rule 34(E) and the matter proceeds to the merits of the amendment application. *See* id. at Rule 34(E)(2). It is the applicant's burden to "show that there are reasons why the status quo should be altered, and the permit amended." Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, Nos. 5L1018-4 and 5L0426-9-EB, Finding of Fact, Conclusions of Law, and Order, slip op. at 12 (Vt. Envtl. Bd. Oct. 3, 2003).

a. *Whether Condition 29 is a Critical Condition*

The first question is whether Condition 29 was "included to resolve an issue critical to the issuance of" Permit -19C. Id. at Rule 34(E)(1). It appears there is no dispute on this issue: Costco is silent and both Vallee and the NRB suggest that Condition 29 is a critical condition. We agree.

[5] As the NRB points out in its filing, Rule 34(E) previously prescribed an intermediate step asking whether the permittee is seeking to relitigate a permit condition. *See, e.g.*, Waterfront Park, No. 138-9-14 Vtec at 6 (May 8, 2015). Under the current Act 250 Rules, that step has been removed and the question of relitigation has been added to the list of factors to be considered in balancing finality and flexibility. Act 250 Rules, Rule 34(E)(3)(g).

Condition 29 was imposed to facilitate compliance with Act 250 Criteria 5 and 9(K), and failure to comply with the latter would lead to a permit denial. *See* Re: Costco Wholesale Corp., No. 4C0288-19C, Findings of Fact, Conclusions of Law, and Order, slip op. at 33–38 (Dist. #4 Envtl. Comm. Jan. 24, 2013); Costco Act 250, No. 41-4-13 Vtec at 43–47, 51 (Aug. 27, 2015); 10 V.S.A. § 6086(a)(9)(K). We conclude that the Condition was critical to the issuance of Permit -19C. *See* Waterfront Park, No. 138-9-14 Vtec at 8 (May 8, 2015) (indicating that a condition is critical if it "was included to ensure compliance with Act 250 criteria"). Therefore, we proceed to the second step under Rule 34(E).

b. The Balance of Flexibility and Finality

To determine whether Costco is entitled to seek an amendment, we must consider the relevant factors and weigh the competing goals of finality and flexibility. At the outset, we note that Costco and Vallee have each put forward numerous factual allegations and arguments concerning the actual or expected traffic impacts of the gas station when it is operating full-time or for limited hours. We agree with the NRB that these considerations, while relevant to the merits of the -19F Amendment application, are not material to the preliminary determination pursuant to Rule 34(E): whether the amendment may be sought at all. *See* Act 250 Rule, Rule 34(E)(2) (requiring the dismissal of the application if the need for finality outweighs the need for flexibility). It is only after concluding that the amendment is justified that we consider the application on the merits. *See* id.; Waterfront Park, No. 138-9-14 Vtec at 5–6 (May 8, 2015) ("Where . . . justification exists for the amendment application, . . . this Court . . . must consider whether the amendments comply with Act 250."). With that in mind, we turn to factors (a)–(g) of Rule 34(E)(3).

Factor (a) concerns "changes in facts, law or regulations beyond the permittee's control." Act 250 Rules, Rule 34(E)(3)(a). Costco argues that the contentious litigation and land acquisition issues outside its control have caused lengthy delays and uncertainty surrounding the gas station project, the MVD Improvements, and DDI project, thereby creating an unforeseeable change in factual circumstances. The NRB broadly shares this view, citing the number of legal challenges and the length of time those challenges have persisted. Vallee contends that there is no change in any relevant fact, that the claimed delays are insubstantial or unsubstantiated, and that any issues were foreseeable.

Whether a change in factual circumstances weighs in favor of flexibility is, by necessity, a case-by-case determination. "The changes adduced in support of the need for flexibility must be relevant to the conditions at issue . . . and must be a driving force behind the proposed amendment." In re Fontaine Act 250 Application, Nos. 12-1-10 Vtec and 143-9-10 Vtec, slip op. at 9 (Vt. Super. Ct.

Envtl. Div. Dec. 20, 2011) (Wright, J.) (quotation omitted). In addition, the relative magnitude and foreseeability of the change is relevant: there is a continuum from changes that are slight or moderate, and foreseeable, to more significant or extreme changes. *See* Stowe Club Highlands, 166 Vt. at 39 ("Permit applicants should consider foreseeable changes in the project during the permitting process, and not suggest conditions that they would consider unacceptable should the project change slightly.") While foreseeability is relevant, "foresight alone does not overcome the conclusion that circumstances might change to such a degree that an amendment is warranted." Waterfront Park Act 250 Amend., 2016 VT 39, ¶ 19.

The nature of the changes alleged by Costco places this Court in the unusual position of considering, among other things, the history of litigation surrounding Costco's gas station project and VTrans' DDI project which encompasses the MVD Improvements required by Condition 29, as material to the question at hand. Though the relevant considerations in this case are perhaps unique, we conclude that their cumulative impact has created a change in factual circumstances beyond Costco's control which weighs in favor of flexibility.

Costco first obtained Act 250 approval for its gas station in early 2013. VTrans sought approval for the DDI project in the same year. Since that time, and in various courts, at least 15 rounds of litigation have ensued surrounding the gas station project or the DDI project. Litigation is still ongoing, and the only conclusion to be drawn from the contentious history of these projects is that the challenges and delays are likely to continue. Vallee argues that litigation and other complications surrounding the DDI project were entirely foreseeable. To be sure, as a general tenet, it should come as no surprise to anyone when an Act 250 permit for a significant project is appealed. Some amount of delay and uncertainty must be expected in such circumstances. Yet, as noted by the NRB and Costco, the sheer volume and diversity of challenges speaks for itself. We cannot agree that this degree of opposition was reasonably foreseeable.[6] This is particularly true where those who

[6] Vallee also argues that it was foreseeable that the MVD Improvements would not be complete by this stage, because this Court found in 2015 that the VTrans could take a decade or more. Our conclusion that circumstances have changed is not based solely on the length of time that has elapsed thus far, and furthermore we cannot agree with Vallee's characterization of the import of that finding. At the time, the Court noted an estimate that the entire DDI project could take "ten or more years" to fully complete. *See* Costco Act 250, No. 41-4-13 Vtec at 16 (Aug. 27, 2015). This, however, says nothing about how long it would take to simply begin construction or the time for completing the smaller MVD Improvements which are a subset of the larger project. Indeed, this finding was part of the Court's conclusion that there was no rational reason to require Costco to await the completion of the entire DDI project. *See* id.

advocated for the DDI project as mitigation for Costco's gas station, and indeed are among the primary beneficiaries of the DDI's traffic improvements, continue to be its principal opponents.

Even if these complications could be considered reasonably foreseeable, we conclude that circumstances have changed to such an extent that an amendment request is warranted. *See* Waterfront Park Act 250 Amend., 2016 VT 39, ¶ 19 ("[F]oresight alone does not overcome the conclusion that circumstances might change to such a degree that an amendment is warranted.").

Now approaching a decade after the two projects were proposed, the duration and breadth of litigation and opposition at venues from the Commission to various levels of Vermont and Federal courts, and the resulting uncertainty as to when the MVD Improvements and the projects more generally will be able to proceed as approved, represents a significant change in factual circumstances. Furthermore, this change is directly relevant to Condition 29 and is not attributable to Costco. Finally, we observe that Costco remains committed to the implementation of the MVD Improvements. Instead of seeking to remove the requirement to complete the improvements, Costco proposes to reduce its own approved hours of operation, purportedly to avoid creating adverse traffic impacts in the interim.[7] This bolsters our conclusion that the amendment is sought in response to ongoing litigation and the associated delays and uncertainty. For all these reasons, we conclude that factor (a) weighs in favor of flexibility. *See* Act 250 Rules, Rule 34(E)(3)(a).

Factor (b) concerns "changes in technology, construction, or operation which necessitate the amendment." Id. at Rule 34(E)(3)(b). As Vallee contends, there is no change in technology or construction necessitating the need for an amendment. However, Costco is proposing a change in operations: it seeks to reduce the operating hours for the gas station by approximately 21.5 percent on a temporary basis. The potential impact of this reduction in operating hours is even more significant than the percentage suggests, since the operational hours that have been cut out correlate to the highest traffic impact hours. As the NRB suggests, we see no reason why Costco would voluntarily reduce its approved operating hours other than in response to the ongoing litigation, delay, and uncertainty it now faces. This cannot be accomplished without an amendment. We therefore we conclude that there is a change in operations necessitating the amendment which weighs in favor of flexibility.

[7] We note that our consideration here does not speak to the merits of the Amendment -19F application – that is, we do not make any determination as to the actual impacts of the proposal. At this stage, the proposal merely serves as evidence of the "driving force" behind the amendment.

Factor (c) asks us to consider "other factors including innovative or alternative design, which provide for a more efficient or effective means to mitigate the impact addressed by the permit condition." Id.at Rule 34(E)(3)(c). We agree with Vallee and the NRB that this factor does not weigh in favor of flexibility. Costco's proposal cannot be considered a "more efficient or effective means" to mitigate the traffic impacts contemplated by Condition 29, because the Condition was imposed in the context of full-time gas station operations. In short, the Amendment -19F application does not propose to mitigate full-time traffic impacts more effectively than Condition 29: it proposes to avoid peak hour traffic altogether. For that reason, and because the reduced hours may have their own traffic impacts, we conclude that Factor (c) weighs in favor of finality.

Factor (d) concerns "other important policy considerations, including the proposed amendment's furtherance of the goals and objectives of duly adopted municipal plans." The parties have not cited any relevant town plan provisions; however, we find that there is an important policy consideration weighing in favor of flexibility. "[T]he purpose of Act 250 is to protect and conserve the lands and environment of the state from the impacts of unplanned and uncontrolled changes in land use." In re N. E. Materials Grp. LLC Act 250 JO #5-21, 2015 VT 79, ¶ 25, 199 Vt. 577 (quotation omitted). Protecting against adverse impacts is not the same as prohibiting use: the latter would run counter to "Act 250's policy of balancing economic development with environmental protection." *See* In re Diverging Diamond Interchange Act 250, 2020 VT 98, ¶ 22. When the permitting process, designed to seek the proper balance for the good of all, is used instead for private gain or as a weapon in unrelated disputes, the entire endeavor is undermined. In this case, the long and varied history of the underlying dispute stretches back to as far as 2007. *See* Costco Act 250, No. 41-4-13 Vtec at 3 (Aug. 27, 2015). After surveying the history, it is difficult to avoid the conclusion that, where this matter is concerned, the mechanisms of Act 250 have become decoupled from its legitimate goals and purposes. This Court must guard against such outcomes, and work to ensure that the permitting process remains focused on the important environmental and land use principles which are the foundation of the law. We conclude that this policy consideration, and therefore factor (d), weighs in favor of flexibility.

Factor (e) contemplates "manifest error on the part of the District Commission, the environmental board, or the environmental court in the issuance of the permit condition." Act 250 Rules, Rule 34(E)(3)(e). No manifest error has been perceived or alleged. Therefore, we conclude that factor (e) weighs in favor of finality.

Factor (f) relates to "the degree of reliance on prior permit conditions or material representations of the applicant in prior proceeding(s) by any party, the District Commission," or this Court. *See* id. at Rule 34(E)(3)(e). It is clear from the record that the Commission relied upon the proposed MVD Improvements, to be completed prior to operating the gas station, in concluding that the gas station project complied with Criteria 5 and 9(K). The Court also relied on the same considerations and Costco's representations on appeal, perhaps to a slightly lesser extent. *See, e.g.*, Costco Act 250, No. 41-4-13 Vtec at 45 (Aug. 27, 2015) (concluding that "the proposed Costco expansion plans, particularly when conditioned upon the completion of the mitigation measures suggested by Costco, conform to Criterion 5"). Though Vallee places a great deal of emphasis on this reliance, Amendment -19F does not undercut Costco's prior commitments to the extent that Vallee suggests. As the NRB points out, this is not a situation where the applicant is seeking to void a condition in its entirety or avoid the substantive obligations therein. *Cf.* Re: Bernard Carrier, No. 7R0639-1-EB, Findings of Fact, Conclusions of Law, and Order, slip op. at 21–22 (Vt. Envtl. Bd. Aug. 19, 1999) ("If conditions to mitigate impacts can simply be ignored and not complied with . . . the protection of the public and the environment . . . is less likely to occur."). The 19-F Amendment application keeps the core requirement of Condition 29—completion of the MVD Improvements—in place. Any impacts from the operation during limited hours proposed by Costco can be addressed should this case reach the merits. Furthermore, Costco will remain committed to completing the MVD Improvements prior to full-time operations of its gas station. For these reasons, although we conclude that factor (f) weighs in favor of finality, we assign it little weight in the overall balance.

The last consideration is factor (g), which asks "whether the applicant is merely seeking to relitigate the permit condition or undermine its purpose or intent." Act 250 Rules, Rule 34(E)(3)(g). Vallee contends that Costco is seeking to relitigate, because its proposal asks the Court to re-hear and reconsider evidence as to whether traffic mitigation is required, and if so what level of mitigation is sufficient. According to Vallee, Costco is advocating to be held to a lesser standard of traffic mitigation than what was found to be necessary or sufficient in prior litigation. This argument ignores the essential feature of the Amendment -19F application: the proposal for limited hours of operation. The prior proceedings for Permit -19C contemplated full-time operations, including operation during the peak traffic hours. Condition 29 was imposed based on an analysis of peak traffic hours. These peak hours are now among the hours during which the gas station will be closed under the present amendment proposal. Thus, we agree with Costco that its application does not call into question the

necessity or sufficiency of the mitigation contemplated in Condition 29: it is simply proposing a temporary alternative scenario which was not contemplated at all in the Permit -19C proceedings. Costco is clear that it accepts the continuing obligation to complete the MVD Improvements before the gas station is opened full-time. That is, before it operates in the context that was originally considered when imposing the Condition 29.

The key question is "whether a desire merely to relitigate lies at the base of the application." *See* Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, Nos. 5L1018-4 and 5L0426-9-EB, Finding of Fact, Conclusions of Law, and Order, slip op. at 18 (Vt. Envtl. Bd. Oct. 3, 2003); *see also* Waterfront Park, No. 138-9-14 Vtec at 9 (May 8, 2015) (concluding that the applicant was not "motivated by a desire to relitigate or undermine" an existing condition). After all, "Act 250 permits are written on paper, not carved in stone, and the relitigation concepts embodied in [Rule] 34(E)[] cannot be considered to be unconditionally ironclad, as, in some sense, every permit amendment application is a relitigation of an initial permit condition." Re: Dr. Anthony Lapinsky, Nos. 5L1018-4 and 5L0426-9-EB at 18 (Oct. 3, 2003). It is particularly relevant that Costco does not seek to void Condition 29 entirely, nor does it suggest that the gas station should be allowed to operate freely without regard for traffic impacts. *See* Waterfront Park, No. 138-9-14 Vtec at 8–9 (May 8, 2015) ("The City is not seeking to abandon the conditions in their entirety and avoid the requirement that [its] events . . . have no undue adverse impacts. . . ."). We also reiterate our conclusion that Costco seeks this amendment in response to ongoing litigation and the associated delays and uncertainty surrounding the gas station project, DDI project, and the implementation of the MVD Improvements. We cannot endorse the proposition that the degree of opposition and number of continuing challenges were reasonably foreseeable. Foresight notwithstanding, we find that their cumulative impact has led to circumstances which support allowing the opportunity to amend. *See* Waterfront Park Act 250 Amend., 2016 VT 39, ¶ 19. Based on the undisputed facts and the considerations above, we conclude that Costco is not merely seeking to relitigate or undermine Condition 29, and therefore factor (g) weighs in favor of flexibility.

The competing goals of finality and flexibility are not easily reconciled, and this case presents a close question. Nonetheless, based on the balance of factors enumerated in Rule 34(E), and for the foregoing reasons, we conclude that flexibility is warranted under the circumstances and prevails over the important goal of finality. Therefore, we conclude that Costco may seek an amendment and this case may proceed to the merits. Costco's motion for summary judgment on the issue of Rule 34(E)

is **GRANTED**, and Vallee's motion is **DENIED** as to that issue. Vallee and Timberlake's joint Question 3 is answered in the affirmative.[8] *See* Joint Amended Statement of Questions. We now turn to the remaining issues raised in Vallee's motion.

II. Additional Preclusion Issues

Vallee seeks summary judgment on two additional issues, raised in its Joint Questions 1 and 2: whether the -19F Amendment is barred by the successive application doctrine, or represents an impermissible collateral attack on a prior permit determination. *See* Joint Amended Statement of Questions. We address these additional questions below.

a. The 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 had 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). Much like Act 250 Rule 34(E) and the Stowe Club Highlands analysis on which it is based, the successive-application 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. Though Vallee seems to acknowledge that Rule 34(E) generally encompasses the relevant considerations, it asks the Court to conduct a separate analysis under the successive application doctrine. Costco and the NRB, on the other hand, argue that Rule 34(E) governs in this case and the successive application doctrine does not apply.

Though there is considerable overlap between the principles underlying Rule 34(E) and the successive application doctrine, there is an immediate distinction to be made in determining whether each applies. As the NRB suggests, the successive application doctrine applies when a second application is made after an earlier denial, while Rule 34(E) applies when the second application seeks to modify a prior approval. *Compare* Carrier, 155 Vt. at 158, *with* Act 250 Rules, Rule 34(E) (asking

[8] Costco's Question 3 also asks "[w]hether [Vallee] or [Timberlake] can be said to have relied on Costco's permit conditions for traffic mitigation under Act 250 Rule 34(E)." *See* Costco's Statement of Questions, filed Apr. 8, 2020. Though the parties cross-moved on the issue of Rule 34(E), no party put forth more than a cursory argument on this particular issue, nor are there any undisputed facts the Court can identify which speak to this question. Furthermore, Rule 34(E) does not suggest that this specific question is always required or relevant when considering whether an amendment is warranted. *See* Act 250 Rules, Rule 34(E)(3)(f). For these reasons, we decline to answer Costco's Question 3 at this time.

whether the application amends a condition critical to the issuance of a permit). In this case, Costco's application seeks to amend a condition of Permit -19C, which was approved by the Commission. Thus, at first glance, it appears the successive application doctrine is inapplicable.

Vallee cites In re Application of Lathrop Ltd. P'ship I for the proposition that a decision could be "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." 2015 VT 49, ¶ 63, 199 Vt. 19 (emphasis in original). Thus, Vallee argues, "[i]t is illogical to reject the use of the successive application doctrine in one instance and not the other." *See* id. Another simple but important distinction separates Lathrop from the present case: this is an Act 250 appeal, while the discussion in Lathrop concerned a municipal zoning matter. *See* id. at ¶ 59. Costco and the NRB correctly note that "an independent set of rules, not the successive application doctrine, are applied to Act 250 permit amendment requests." In re Dunkin Donuts, 2008 VT 139, ¶ 9 n.2 (citing In re Stowe Club Highlands, 166 Vt. 33, 37–38 (1996)). In Stowe Club, the Court noted that it was "neither appropriate nor necessary . . . to fully explore what standards should guide the Board in evaluating applications for permit amendments. That task belongs, in the first instance, to the Board, which may decide to express those standards through rulemaking . . . ." Stowe Club Highlands, 166 Vt. at 37.

As we have already discussed above, the relevant standards are now codified in Act 250 Rule 34(E). Though the successive application doctrine does not apply to permit amendment requests in the Act 250 context, we do not suggest that the doctrine has no place in Act 250. It too has been codified, under Act 250 Rule 30(C) which is titled "Successive Applications." *See* Act 250 Rules, Rule 30(C). Pursuant to Rule 30(C), "The District Commission [or this Court on appeal] shall dismiss any application that involves substantially the same project as an earlier application that has been denied, when there has been no significant change in other facts or law that addresses all the grounds for denial." Id. Beyond the simple fact that Costco's Permit -19C was approved, the standard above encompasses the same considerations as factor (a) under Rule 34(E)(3). *See* id. at Rule 34(E)(3)(a) (considering "changes in fact, law, or regulations"). Thus, we agree with the NRB that analysis of a permit amendment under both Rule 30(C) and Rule 34(E) would be more than duplicative: it would directly contravene Rule 34(E) by contemplating preclusion based on just one of the several factors which should be considered in balancing finality and flexibility. *See* id. at Rule 34(E)(2) (requiring a "balancing test" based on the factors listed under Rule 34(E)(3)). For all these reasons, we conclude

that the successive application doctrine, codified in Rule 30(C), does not apply in this case.[9] Vallee's motion is therefore **DENIED** as to this issue, and Vallee's Joint Question 1 is answered in the negative. *See* Joint Amended Statement of Questions.

b. Collateral Attack

Where a land use permit, including an Act 250 permit, has become final, "a party cannot later collaterally attack that final decision through a separate proceeding." *See* In re Champlain Parkway Wetland Conditional Use Determination, 2018 VT 123, ¶ 30, 209 Vt. 105 (citations omitted). Vallee argues that the -19F Amendment application must be viewed as an impermissible collateral attack. Though Vallee offers little in the way of explanation, it contends that Costco is attempting to challenge the determination in Permit -19C that the MVD Improvements must be complete before operating the gas station. While we agree that Costco is seeking to modify Condition 29, in that it proposes to operate during some hours before improvements are complete, we conclude that its proposal does not represent an impermissible collateral attack.

Costco is not challenging the necessity of Condition 29 for the impacts it was designed to address. Condition 29 was considered and imposed based on a proposal for full-time operations. An analysis of 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. As the other parties have explained, the question presented by Amendment -19F is whether there are limited hours in which the gas station can operate without creating the impacts addressed by Condition 29. This is not a collateral challenge: it is a proposal to modify Permit -19C. *See* In re Hildebrand, 2007 VT 5, ¶ 12, 181 Vt. 568 (citing Stowe Club Highlands, 166 Vt. 33 (1996)) (agreeing that "although . . . original conditions may no longer be challenged, they

[9] Vallee also suggests, without supporting citations, that the doctrine of judicial estoppel is inherent to the considerations under the successive application doctrine "and/or" Rule 34(E). 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 the context of Act 250. *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). The sole Act 250 case cited by Vallee does not apply the doctrine and does not relate to permit amendments or successive applications. *See* Laberge, No. 96-8-16 Vtec, slip op. at 1, 18–19 (Aug. 15, 2017). We decline to unilaterally adopt and apply judicial estoppel in this case, and furthermore we note that Costco continues to affirm that the MVD Improvements should be completed before the gas station operates for the full-time hours contemplated by Permit -19C.

may be amended in appropriate circumstances."). We therefore conclude that the Amendment -19F application is not an impermissible collateral attack on Permit -19C. Vallee's motion is **DENIED** as to this issue, and Timberlake/Vallee Joint Question 2 is answered in the negative. *See* Joint Amended Statement of Questions.

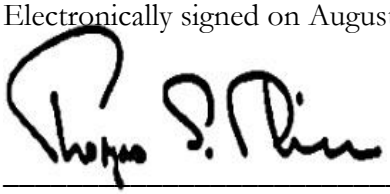
Conclusion

For the foregoing reasons, we conclude that the need for flexibility in this matter outweighs the need for finality. Act 250 Rule 34(E) does not bar Costco's Amendment -19F application. The successive application doctrine, codified through Act 250 Rule 30(C), does not apply. The application does not represent an impermissible collateral attack on Permit -19C. Therefore, Costco's amendment request may be heard on the merits.

Costco's motion for summary judgment is **GRANTED**, and Vallee's motion is **DENIED**. Vallee and Timberlake's Joint Questions 1 and 2 are answered in the negative. Their Joint Question 3 is answered in the affirmative.

The Court Operations Manager will set this matter for a final pre-trial status conference, so that the Court may discuss with the parties the necessary trial preparations.

Electronically signed on August 31, 2021, at Newfane, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge
Environmental Division