VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 79-7-19 Vtec

Katzenbach A250 Permit #7R1374-1

ENTRY REGARDING MOTION

Title: Motion to Amend Judgment
Filer: David L. Grayck
Filed Date: May 12, 2021

Response in support filed by the Town of Albany on May 21, 2021.
Response in opposition filed by Jeffrey Ellis on May 26, 2021.

The motion is **DENIED**.

This Court issued its Merits Decision (Decision) and accompanying judgment order in this matter on April 16, 2021. Katzenbach A250 Permit #7R1374-1, No. 79-7-19 Vtec, slip op. (Vt. Super. Ct. Envtl. Div. Apr. 16, 2021) (Walsh, J.). This matter concerns Rebecca Beidler and Jeffrey Ellis' (together, Neighbors) appeal of a District #7 Environmental Commission (District Commission) Act 250 Permit, issued on June 13, 2019, to Christian and Clark Katzenbach's (Applicants) for the development and operation of a 3-acre commercial sand and gravel pit on property located off West Griggs Road in Albany, Vermont. In the Decision, this Court determined that the application for an Act 250 Land Use Permit, as conditioned, complied with Act 250 Criteria 1, 1(D), 1(E), 4, 5, and 8 and remanded the matter to the District Commission for the ministerial act of issuing a permit consistent with the Commission's June 13, 2019 decision, as modified by the Decision. See Id. at 52–53 (including listed conditions).

Presently before the Court is Applicants' motion to alter or amend this Court's Decision and final judgment order pursuant to V.R.C.P. 59 (e). Specifically, Applicants request to alter a condition imposed by this Court to ensure compliance with Act 250 Criterion 8 concerning the hauling of extraction material on West Griggs Road. The Decision directs that haul trucks:

> shall not travel West Griggs Road between 12:00PM and 1:00PM on any day. As additional mitigation of project impacts, haul trucks use of West Griggs Road shall be limited to 10:00 AM to 12:00 PM and 1:00 PM to 3:00 PM on weekdays,

10:00 AM to 12:00 PM on Saturdays, with no operation on national holidays. These time restrictions do not apply to pit operations.

Id. at 42–47 (assessing noise impacts under Act 250 Criterion 8). Applicants request that this Court amend the Decision to allow for hauling of sand and gravel "from 8:00 a.m. to Noon, and from 1:00 p.m. to 4:00 p.m., Monday-Friday; and 9:00 a.m.-Noon, on Saturday." See Motion to Alter or Amend Judgment by Applicant filed on May 12, 2021, at 1.

Applicants argue, pursuant to Rule V.R.C.P. 59 (e), that this Court failed to consider the recent Vermont Supreme Court Decision In re JSCL, LLC CU Permit (JSCL), issued on April 2, 2021, in connection with the issuance of the Decision. Id. at 3 (citing In re JSCL, LLC CU Permit, 2021 Vt 22). Neighbors oppose Applicants' motion, arguing that (1) Applicants do not meet the criteria for a motion to alter under V.R.C.P. 59 (e) and (2) the Court imposed hours of operation conditions serve to mitigate several adverse impacts. See Response in Opposition to Applicants' Motion to Alter or Amend filed on May 26, 2021, at 1–2.

We have identified four principal reasons for granting a Rule 59 (e) motion: (1) "to correct manifest errors of law or fact"; (2) to allow a moving party to "present newly discovered or previously unavailable evidence"; (3) to "prevent manifest injustice"; and (4) to respond to an "intervening change in the controlling law." In re Lathrop Ltd. P'ship I, Nos. 122-7-04 Vtec, 210-9-08 Vtec, and 136-8-10 Vtec, slip op. at 10-11 (Vt. Super. Ct. Envtl. Div. Apr. 12, 2011) (Durkin, J.) (quoting 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1); Drumheller v. Drumheller, 2009 VT 23, ¶ 29, 185 Vt. 417 ("Vermont Rule 59(e) is substantially identical to Federal Rule of Civil Procedure 59(e), and we have looked to federal decisions interpreting the federal rule for guidance in applying the Vermont rule.").

The grant of a motion to alter or amend "a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2810.1; see also In re Zaremba Grp. Act 250 Permit, No. 36-3-13 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J). Indeed, Rule 59 (e) is not intended for providing parties an avenue to relitigate issues already raised and rejected by the Court. Town Clarendon v. Houlagans MC Corp. of VT., No. 131-10-17 Vtec, slip op. at 1 (Vt. Super. Ct. Envtl. Div. Apr. 10, 2014) (Walsh, J.); see also In re Boutin PRD Amendment, No. 93-4-06 Vtec slip op. at 1–2 (Vt. Envtl. Ct. May 18, 2007) (Wright, J.) (stating that mere disagreement with the Court's decision does not provide adequate grounds for reconsideration).

Applicants appear to argue that JSCL presents an intervening change in controlling law, requiring this Court's consideration. We therefore address the relevance of JSCL. Applicants argue that JSCL requires that a Criterion 8 analysis cannot lead in an irrational result and the limited hours of operation imposed by this Court's Decision are, under JSCL, "unjust, unreasonable, and absurd." See Applicants' Motion to Alter or Amend at 3–4 (citing JSCL, 2021 Vt at ¶ 21). We disagree.

The basis of In re JSCL was a conditional-use application, not an Act 250 permit. In re JSCL, 2021 Vt at ¶ 1. The analysis conducted by the Supreme Court in JSCL centered upon whether noise impacts complied with the Town zoning bylaws, which required the proposed project "must not "adversely affect . . . the character of [the] affected area." Id. at ¶ 15 (citing

Town of Ferrisburgh Bylaw § 8.1). In JSCL, the Supreme Court was primarily concerned with whether this Court's interpretation a bylaw provision[1] applied to vehicles crossing the property line.

Indeed, the Supreme Court ultimately upheld this Court's interpretation of the bylaw as failure to do so would "*deny all* projects that would have vehicles entering or exiting a roadway" and "*virtually any* non-agricultural conditional use [under the environmental Division's interpretation of the bylaw] would be barred." Id. at 17, 21 (emphasis added).[2] While the Supreme Court recognized that the bylaws' language was likely based upon Criterion 8 of Act 250 and therefore parallels may be drawn, the Court did not conclude JSCL solely on the basis that Act 250 "should not be applied rigidly." See id. at 19, 27 (comparing the Town's bylaws with Act 250 for demonstrative purposes). In JSCL, the Supreme Court concluded that it "will not adopt an interpretation of a zoning ordinance that would require the denial of all conditional use permits." Id. at 21 (noting that such an irrational result would be contrary to legislative intent and would be "absurd" as it would "prohibit many uses that are otherwise expressly sanctioned by the bylaws."). Thus, the JSCL decision concerned bylaw interpretation rather than an assessment of the application of Act 250 Criterion 8. Id. at 22 (stating that the bylaw "must be interpreted in the context of the zoning ordinance as a whole" and assessing the plain language and legislative intent). In contrast, this Court's Decision was premised upon whether the project posed an "undue adverse effect" and whether the applicant had taken reasonable and generally available mitigating steps. See Katzenbach, No. 79-7-19 Vtec at 41–47 (Apr. 16, 2021) (concluding that the truck noise impacts would be adverse and undue, therefore prompting the Court to ensure compliance with Criterion 8 by imposing a time limitation upon truck operating hours).

Even applying the standard used in JSCL, which requires that the interpretation of a town bylaw must not lead to an "unjust, unreasonable, and absurd consequence," the Court's imposed limitation on operating hours does not rise to the level of "absurd." See in re JSCL, 2021 Vt at ¶ 21. In JSCL, the Supreme Court noted that if the "70-dB limitation applies to vehicles crossing the property line, *virtually any* non-agricultural conditional use would be barred" and would "require the denial of *all* conditional use permits." Id. (emphasis added). Here, Applicants argue that this Court's Decision, limiting haul truck operating hours to 22 hours per week, as opposed to the 38 hours per week requested in Applicants' motion, constitutes an "impractical, infeasible limitation" inconsistent with JSCL.[3]

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[1] The provision of the Bylaw in dispute, § 8.1, required: "No noise which is excessive at the property line and represents a significant increase in noise levels in the vicinity of the development so as to be incompatible with the reasonable use of the surrounding area shall be permitted. Specifically, the sound pressure level should not exceed seventy decibels at the property line at any time, except for agricultural uses." In re JSCL, 2021 Vt at ¶ 17.

[2] While the Supreme Court reversed and remanded this Court's imposed condition that limited truck traffic hours in JSCL, the basis for the reversal was that the condition was impermissibly vague, not that the condition was "irrational" or "absurd." Id. at ¶ 43 (stating that qualitative terms "minimize" did not contain a definite standard and "emergency" was not defined).

[3] Applicant also appears to argue that the Decision is inconsistent with OMYA as "the evidence does not establish a real and substantial adverse relationship between the hauling of earth extraction material and the public welfare."

In contrast to JSCL, this Court merely imposed a reduction in haul truck operating hours, which still permits the operation of Applicant's project and does not interpret Criterion 8 in a way which would prohibit "virtually all" future Act 250 permits or vehicle traffic. Katzenbach, No. 79-7-19 Vtec at 47 (Apr. 16, 2021). Moreover, this Court concluded that the project posed an undue adverse impact in the absence of further mitigation. Id. at 44–47. The natural remedy of such a finding is to impose mitigation concerning the haul truck operating hours of the source of the adverse impact. See In re Big Rock Gravel Act 250 Permit, No. 45-3-12 Vtec, slip op. at 7–10 (Vt. Super. Ct. Envtl. Div. Nov. 28, 2012) (Walsh, J.) (imposing noise limitations as a condition to address the source of the adverse impact). Here, the source of the adverse impact was the operation of the haul trucks. Id. Therefore, based upon the finding of an adverse impact, the Court is justified in imposing reasonable conditions on the haul truck hours of operation. See In re Denio, 158 Vt. 230, 240 (1992) (citing In re Quechee Lakes Corp., 154 Vt. 543, 550 n. 4 (1990)). For these reasons, see no basis for concluding that the imposed restriction on haul truck operating hours rises to the level of "absurd" as it permits active operation consistent with mitigation of an undue adverse impact.

As a final note, we address the Town of Albany's concerns raised in their memorandum in support of Applicants' motion to alter or amend. The Town appears to argue that this Court is improperly imposing broad restrictions on public roads. This is not the case. This Court is specifically reviewing Act 250 requirements and imposing necessary conditions on a proposed project in accordance with criteria therein. See In re Big Rock Gravel Act 250 Permit, No. 45-3-12 Vtec at 10 (Nov. 28, 2012) (placing a condition on a proposed gravel extraction project to ensure it does not result in an undue adverse impact from noise); see also In re R.E. Tucker, Inc., 149 Vt. 551, 557–58 (1988) (imposing conditions in an Act 250 permit where a gravel crusher to mitigate the severity of noise pollution). The conditions imposed in this matter to not apply to other use of the public road.

See Applicants' Motion to Alter or Amend at 5 (citing Re: OMYA, Inc. and Foster Brothers Farm, Inc., No. 9A0107-2-EB, Findings of Fact, Conclusions of Law, and Order (Vt. Envtl. Bd. May 25, 1999)); see also OMYA, Inc. v. Town of Middlebury, 171 Vt. 532, 533 (2000) (stating that the Environmental Board's finding that truck traffic under Criterion 4 would have a real and substantial relationship to public welfare where the trucks generated dust, fumes, and noise). Here, Applicants' argument addresses whether the imposed limitation on truck operating hours is a reasonable mitigation condition that serves the public's interest in noise reduction. This Court addressed this very issue in our Decision by weighing evidence on noise impacts and Applicants' presented modeled scenarios of truck hauling operations. See Katzenbach, No. 79-7-19 Vtec at 43–47 (Apr. 16, 2021). Therefore, Applicants as argument does not seek to correct a manifest error of law or fact, present newly discovered evidence, prevent manifest injustice, or constitute a change in the controlling law, it does not meet the standard under Rule 59 (e).

In addition, to the extent that Applicants argue that the condition on truck haul operating hours is based upon a manifest error of fact, this Court's decision to impose limited hours was based upon Applicants' evidence presented at trial of the project's modeled operating impacts and we note that Applicants did not enter into evidence the project's operational capacity or constraints. Id. at 46–47 (discussing three modeled scenarios and recognizing that while "the Project might not operate at its limits, but we must evaluate the implications of the full proposal"). Therefore, Applicants have not met the Rule 59 (e) standard.

For the reasons addressed above, we **DENY** Applicants' motion to alter or amend, pursuant to V.R.C.P. 59 (e). This concludes the matter before the Court.

Electronically Signed: 7/20/2021 8:41 AM pursuant to V.R.E.F. 9(d).

Thomas G. Walsh, Judge
Superior Court, Environmental Division