

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION  
Docket No. 169-12-16 Vtec

Diverging Diamond Interchange A250

**ENTRY REGARDING MOTION**

Count 1, Act 250 District Commission Decision (169-12-16 Vtec)

Count 2, Act 250 District Commission Decision (169-12-16 Vtec)

Title: Motion to Order Joinder of Town of Colchester (Motion 23)  
Filer: Co-counsel  
Attorney: Alexander J. LaRosa  
Filed Date: December 23, 2019

Response filed on 12/23/2019 by Attorney David L. Grayck for Additional Appellant Timberlake Associates, LLP  
Support

Response filed on 01/02/2020 by Attorney Evan P. Meenan for Interested Person Natural Resources Board  
Does not support or oppose

Response filed on 01/06/2020 by Attorney Jenny Ronis for party 7 Co-counsel  
Response

**The motion is DENIED.**

RL Vallee, Inc. (Vallee) and Timberlake Associates, LLC (Timberlake) appeal Act 250 permit #4C1271 and associated amendments<sup>1</sup>, issued jointly on November 28, 2016 by the District #4 Environmental Commission (District Commission) to the Vermont Agency of Transportation (VTRANS) for the Diverging Diamond Interchange and related improvements proposed at Interstate 89, Exit 16 in Colchester (the Project). After a remand from the Vermont Supreme Court, the issues are limited to whether the Project will cause undue water pollution through increased chloride or phosphorous discharges. Now pending before this Court is Vallee's motion to order the joinder of the Town of Colchester (the Town) as a necessary co-applicant in this matter.

Vallee asserts that the Town owns and controls certain roads and other proposed infrastructure within the Project area, and the Town is responsible for the application of road salts on those surfaces to control snow and ice. As road salts contain chloride, Vallee suggests that the Town's activities will contribute to chloride discharge from the Project. Vallee argues that VTrans cannot control the Town's activities, and therefore Act 250 Rule 10(A) requires the Town to be joined as a co-applicant to enable a complete review and to ensure that any permit conditions relating to chloride or road salt are binding on the relevant parties.

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<sup>1</sup> Permit amendments #4C0676R-16, #4C0288-21, #4C0757-24, and #4C0471-7.

Rule 10(A) provides, in part:

An application shall be signed by the applicant and any co-applicant . . . . The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement . . . . The district commission may . . . find that the property interest of any such person is of such significance, therefore demonstrating a lack of effective control by the applicant, that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

Act 250 Rule 10(A).

Both the District Commission and this Court have discretion to determine whether landowners must be joined as co-applicants. See Re: David Enman (St. George Property), DR #346, 1996 WL 782841, Findings of Fact, Conclusions of Law, and Order, at \*13 (Vt. Env'tl. Bd. Dec. 23, 1996) (citing In re Pilgrim P'ship, 153 Vt. 594, 595 (1990)) ("Requiring a person to be a co-applicant is at the discretion of the commissions and the Board."); In re JLD Properties, Nos. 242-10-06, 92-5-07, and 116-6-08 Vtec, slip op. at 17 (Vt. Env'tl. Ct. Mar. 16, 2009) ([I]n our *de novo* review . . . this Court stands in the shoes of the District Commission."). On the facts before us, we find that the Town is not a "necessary" co-applicant under Rule 10(A). Two points of law inform our decision.

First, the language in 10 V.S.A § 6083(f) and Rule 10(A) itself allows VTrans to continue as the sole applicant. Subsection 6083(f) states: "In situations where the party seeking to file an application is a State agency . . . empowered to condemn the involved land or an interest in it, the application need only be signed by that party. 10 V.S.A. § 6083(f). Likewise, Rule 10(A) states: "When the applicant is a state agency . . . empowered to condemn the involved land or an interest in it, then the application need only be signed by that party." Act 250 Rule 10(A). VTrans is a state agency, and 19 V.S.A. Chapter 5 empowers it to condemn the land involved in the Project. See 19 V.S.A. § 502 ("The Agency . . . may take any property necessary to . . . improve any State highway, including affected portions of town highways.").

Second, "[t]he purpose of the co-applicant requirement of Rule 10(A) is not to require that every potentially impacted landowner sign the permit application, but rather 'to ensure that any permit conditions imposed . . . will be enforceable.' Hinesburg Hannaford CU Approval, No. 113-8-14 Vtec, slip op. at 5 (Vt. Super. Ct. Env'tl. Div. Oct. 27, 2015) (quoting Re: Maple Tree Place, No. 4C0775-EB, Mem. of Decision, at 13 (Vt. Env'tl. Bd. March 25, 1998)). We agree with Vallee that snow and ice control measures are likely to be central to our evaluation of chloride under Criterion 1. On the evidence before us, however, we cannot conclude that the areas owned or controlled by the Town are "of such significance" to the Project, our review, or enforceable permit conditions that the Town must be required to join this proceeding. See Act 250 Rule 10(A).

Vallee contends that the Town "is responsible for the application of chloride over a significant portion of the Project area," yet VTrans' "Chloride Management Plan" for the Project was submitted by both parties and suggests otherwise. It appears that VTrans is currently responsible for 4.62 lane miles within the Project area while the Town is responsible for .63 miles. The plan shows that the Project will add .38 new lane miles in total, and the Town will be responsible for .09 new lane miles. This indicates that the Town's snow and ice control activities in the Project area will represent a small portion of the overall management responsibility.

To the extent the Town's area of responsibility may become significant to any future permit conditions, VTrans asserts that it has the statutory authority to "do Project-related work on the[] town highways." VTrans also notes that it has maintenance agreements which can

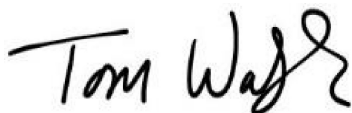
“ensure that the Town follows proper road maintenance” operations in some areas. Any permit conditions will bind VTrans, the party who appears responsible for the great majority of involved roadways. We do not see a reason to require the Town’s involvement without evidence that VTrans will be unable to achieve compliance. See Re: Liberty Oak Corp., No. 3W0496-EB-1, Findings of Fact, Conclusions of Law, and Order, at 6 (“As the permit holder, the Applicant . . . [is] responsible for complying with the conditions of the permit . . . . The method by which the permit holder achieves compliance is not a concern of the Board.”).

Finally, regarding our ability to conduct a full review under Criterion 1, it is enough that VTrans states it can adequately manage water quality for the Project on its own. VTrans has the burden of producing enough evidence at trial for us to find that the Project will not create undue water pollution. See In re Rinkers, Inc., No. 302-12-08 Vtec, slip op. at 11 (Vt. Env’tl. Ct. May 17, 2010) (Wright, J.) (applicants bear the initial burden of production on Act 250 criteria). Rule 10(A) is not meant “to require that every potentially impacted landowner sign the permit application.” Hinesburg Hannaford, No. 113-8-14 Vtec at 5 (Oct. 27, 2015). Requiring towns to join state projects without good reason would unnecessarily impede public works and impose liability on entities who are peripheral to the underlying applications. See Re: Steven B. Tanger, No. 3W0125-3-EB, Mem. of Decision, at 2 (Vt. Env’tl. Bd. Aug. 29, 1989) (noting that Rule 10’s purpose to ensure enforceability can be “outweighed by the potential burdens [im]posed on the Agency and the Town.”).

The motion is **DENIED**.

So ordered.

Electronically signed on January 07, 2019 at 03:08 PM pursuant to V.R.E.F. 7(d).



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Thomas G. Walsh, Judge  
Superior Court, Environmental Division

Notifications:

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