

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 123-10-16 Vtec

Champlain Parkway Wetland CUD permit Extension Application

ENTRY REGARDING MOTION

Count 1, ANR Wetland CUD Permit Extension (123-10-16 Vtec)

Title: Motion to Amend/Alter 4/14/2017 Decision (Motion 6)

Filer: Fortieth Burlington, LLC

Attorney: Judith L. Dillon

Filed Date: April 28, 2017

Response in Opposition filed on 05/22/2017 by Attorney Brian S. Dunkiel for City of Burlington

Reply in Support of Motion filed on 06/13/2017 by Attorney Judith L. Dillon for
Appellant Fortieth Burlington, LLC, with Request for Hearing

Response in Opposition to Motion filed on 06/21/2017 by Attorney Hannah W. Smith
for Interested Person Vermont Agency of natural Resources

The Clerk shall schedule a MOTION HEARING.

By its pending Motion to Alter or Amend this Court's April 14, 2017 Decision, Appellant Fortieth Burlington, LLC ("Fortieth") essentially requests that this Court reinstate Questions 3–6 from Fortieth's Statement of Questions, filed on October 27, 2016.¹

We remain convinced that the Wetlands Conditional Use Determination (File No. 2010-125; hereinafter referred to as "CUD"), issued on January 14, 2011, to the City of Burlington ("City") by the Vermont Agency of Natural Resources ("ANR") does not require the City to conduct a new wetlands delineation or an evaluation of any delineation prior to the City applying for an extension of the CUD's five-year term. Compare CUD at ¶¶ 1(D) and 1(E) at p. 4.

In re-affirming our determination that Fortieth's Questions 3 and 4 pose legal issues that are not properly raised in this appeal concerning an extension of the time period for the previously-issued CUD, we are persuaded by the legal memorandum provided by ANR, filed on

¹ In its June 13, 2017, Reply to the City's Opposition Memorandum to Fortieth's Motion to Alter or Amend, Fortieth asks that the Court also reverse its dismissal of Question 6, for reasons similar to those offered to justify the reversal of the Court's dismissal of Questions 3 and 4.

June 21, 2017. For these reasons, we **DENY** Fortieth's request that we reinstate its Questions 3 and 4, since both of those Questions are premised upon a condition that is not within the CUD: namely, a condition that the City first complete a re-evaluation or re-delineation of wetlands prior to or as part of the City's extension application.

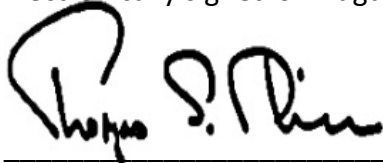
The parties' filings appear to represent that the City did conduct a re-evaluation of the wetlands delineation, after filing its permit extension application, but before ANR issued its approval of the City's extension request. Our reading of the CUD Conditions is that the procedures for receiving a permit time extension (pursuant to Condition 1(D)) and for completing the necessary wetlands delineation re-evaluation required by Condition 1(E) are two distinctly separate proceedings, as suggested by ANR. See ANR Memorandum in Opposition to Fortieth's Motion to Alter or Amend, filed on June 21, 2017, at p. 2.

At the same time, we are left to wonder if, pursuant to the applicable wetlands regulations, a permittee's re-evaluation of a wetlands delineation, after five years, is simply submitted to ANR, or if the regulations provide for some type of ANR review and approval. Whether the applicable regulatory provisions require such review or approval as part of a review of a permit extension request, or simply as a separate proceeding, is also of interest and appears relevant to the Court's review of the pending motion.

We therefore direct that the parties prepare for a hearing on Fortieth's pending motion to address these and any other relevant questions. We will also at the scheduled hearing address the issues raised by the City's motion to dismiss Fortieth's clarified Question 7. A Notice of Hearing is attached to this Entry Order

So ordered.

Electronically signed on August 08, 2017 at Burlington, Vermont, pursuant to V.R.E.F. 7(d).



Thomas S. Durkin, Superior Judge

Notifications:

Judith L. Dillon (ERN 5040), Attorney for Appellant Fortieth Burlington, LLC
Randy Joe Miller (ERN 7037), and Hannah W. Smith (ERN 6759), Attorneys for
Interested Person Vermont Agency of Natural Resources
Brian S. Dunkiel (ERN 4594), and Jonathan T. Rose (ERN 2170), Attorneys for
Interested Person City of Burlington