



State of Vermont

LAND USE PERMIT AMENDMENT

CASE NO: 4C0288-19F

Costco Wholesale Corporation
c/o Mark Marchisano
45940 Horseshoe Drive, Suite 150
Sterling, VA 20166

LAWS/REGULATIONS INVOLVED

10 V.S.A. §§ 6001 - 6093 (Act 250)

and

Costco Wholesale Corporation
c/o Mark Marchisano
999 Lake Drive
Issaquah, WA 98027

The District 4 Environmental Commission hereby issues Land Use Permit Amendment #4C0288-19F, pursuant to the authority vested in it by 10 V.S.A. §§ 6001-6093. This permit amendment applies to the lands identified in Book 789, Pages 511-512, of the land records of Colchester, Vermont.

This permit specifically amends condition #29 of Land Use Permit ("LUP") #4C0288-19C and authorizes the operation of the Costco Wholesale Corporation ("Costco") gasoline station during limited hours, until the roadway infrastructure work required by LUP #4C0288-19C has been completed (the "Project"). The Project is located on 218 Lower Mountain View Drive in Colchester, Vermont.

Jurisdiction attaches because the Project constitutes a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

1. The Permittee, and its assigns and successors in interest, is obligated by this permit to complete, operate and maintain the Project as approved by the District 4 Environmental Commission (the "Commission") in accordance with the following conditions.
2. The Project shall be completed, operated and maintained in accordance with: (a) the conditions of this permit, (b) Findings of Fact and Conclusions of Law 4C0288-19F and (c) the permit application, plans, and exhibits on file with the Commission and other material representations.
3. All conditions of Land Use Permit #4C0288 and amendments are in full force and effect except as further amended herein.
4. Representatives of the State of Vermont shall have access to the property covered by this permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.

5. No change shall be made to the design, operation or use of this Project without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
6. No further subdivision, alteration, and/or development on the tracts of land approved herein shall be permitted without a permit amendment issued by the Commission or a jurisdictional opinion from the District Coordinator that a permit is not required.
7. Pursuant to 10 V.S.A. § 8005(c), the Commission may at any time require that the permit holder file an affidavit certifying that the Project is in compliance with the terms of this permit.
8. The conditions of this permit and the land uses permitted herein shall run with the land and are binding upon and enforceable against the Permittee and their successors and assigns.
9. The Permittee is authorized to operate the Costco gasoline station during the following limited hours of operation; 6AM-2PM and 6PM-10PM on weekdays; 6AM-10AM and 6PM-10PM on Saturdays; and 6AM-10PM on Sundays.
10. Condition #29 of LUP #4C0288-19C shall be amended to read, as follows:
 - a. Permittees will construct or fund the construction of dual westbound left-turn lanes and an exclusive northbound right-turn lane at US Route 7/Lower Mountain View Drive, a second right-turn lane on the eastbound approach of Upper Mountain View Drive, and the storage length for the westbound through/right-turn lane shall be increased from 170' to 200' (collectively referred to as the "LMVD Improvements"). Construction of the LMVD Improvements shall be made prior to occupancy of the warehouse expansion and full-time operation of the gas fueling station unless the Exit 16 Improvements are under construction.
 - b. The Permittees shall pay a proportional fair-share monetary contribution towards the preferred mitigation and improvement strategy for the US Route 7/I-89 interchange (also referred to as the "Exit 16 Improvements"). The fair share calculation has been determined to be 7.1% of the Exit 16 Improvements which has been estimated to cost \$5,100,000 [$7.1\% \times \$5,100,000 = \$362,100$]. The Permittee is also responsible for a fair-share monetary contribution toward the LMVD Improvements. The fair-share calculation has been determined to be 20% of the LMVD Improvements which has been estimated to cost \$720,000 [$20\% \times \$720,000 = \$144,000$]. If the Permittees fully fund and construct the LMVD Improvements, then they will be afforded an opportunity to seek reimbursement from Vermont Agency of Transportation of any monies spent above the calculated fair-share contribution for LMVD Improvements, after construction is complete.
 - c. To date, the Permittees have paid the Vermont Agency of Transportation \$325,000 towards their fair-share monetary contribution toward the Exit 16 Improvements. The remainder of the fair-share monetary contribution for the Exit 16 Improvements [$\$362,100 - \$325,000 = \$37,100$] and the fair-share monetary contribution for the LMVD Improvements [$\$144,000$] shall be paid to an account with the Vermont Agency of Transportation within 60 days of permit issuance.

- d. [This sub-condition has been satisfied]
 - e. If the Vermont Agency of Transportation has not commenced construction and made substantial progress toward completion of the Exit 16 Improvements and the Permittee wishes to open the warehouse expansion or conduct full-time operation of the gasoline station, then the Permittee shall pay for the evaluation and implementation of modified signal timings along the US Route 7 corridor.
11. The Permittee shall implement the following traffic mitigation measures:
- a. Prior to operation of the gasoline station, the Applicant shall post the hours of operation of the gasoline station on one unlit sign to be located near the entrance to the gasoline station on Lower Mountain View Drive and on one unlit sign to be located near the gasoline station attendant booth.
 - b. During the hours of operation of the gasoline station, the Applicant shall provide a staff person to oversee the management of hours of operation of the gasoline station and management of related traffic including the prevention of parking in wait for the gasoline station on Lower Mountain View Drive.
 - c. For the first month of the gasoline station operations, the Applicant shall provide a staff person to oversee the functioning of the gasoline station during hours when the warehouse is open but the gasoline station is closed to prevent customers from parking in wait for the gasoline station on Lower Mountain View Drive.
 - d. The Applicant shall control the hours of operation of the gasoline station by having a staff person place a chain or other comprehensive barrier at the entrance and exit of the gasoline station and turning off the gasoline station pumping equipment.
 - e. The Applicant shall complete and submit a traffic monitoring study. The monitoring study shall include conducting traffic turning movement counts between 6-9 months from the commencement of gas station operations. At a minimum the study shall analyze the level of service, delay, queue lengths and crash records at the studied intersections. The traffic monitoring study shall be submitted to VTrans and the Act 250 District Commission within one year of the commencement of gas station operation.
12. The Permittee shall provide each prospective purchaser of any interest in this Project a copy of the Land Use Permit Amendment and the Findings of Fact before any written contract of sale is entered into.
13. The Permittee shall reference the requirements and conditions imposed by Land Use Permit #4C0288-19F in all deeds of conveyance and leases.
14. Pursuant to 10 V.S.A. § 6090(b)(1), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the Permittee has not commenced construction and made substantial progress toward completion within the three-year period in accordance with 10 V.S.A. § 6091(b).

15. Failure to comply with any condition herein may be grounds for permit revocation pursuant to 10 V.S.A. sec. 6027(g).

Dated at Essex Junction, Vermont, this 28th day of February 2020.

By /s/Thomas A. Little, Chair
Thomas A. Little, Chair
District #4 Commission

Members participating in this decision:

Parker Riehle
James McNamara

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

For additional information on filing appeals, see the Court's website at: <http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

State of Vermont
NATURAL RESOURCES BOARD
DISTRICT 4 ENVIRONMENTAL COMMISSION
111 West Street • Essex Junction • Vermont 05452

RE: Costco Wholesale Corporation
c/o Mark Marchisano
45940 Horseshoe Drive, Suite 150
Sterling, VA 20166

Application #4C0288-19F
Findings of Fact
Conclusions of Law, and Order
10 V.S.A. §§ 6001-6093 (Act 250)

and

Costco Wholesale Corporation
c/o Mark Marchisano
999 Lake Drive
Issaquah, WA 98027

I. INTRODUCTION

On July 24, 2018 the District #4 Environmental Commission (the “Commission”) received amendment Application #4C0288-19F, to amend condition #29 of Land Use Permit (“LUP”) #4C0288-19C proposing to operate the Costco Wholesale Corporation (“Costco” or the “Applicant”) gas station during limited hours, until the roadway infrastructure work required by LUP #4C0288-19C has been completed (the “Project”). This application was deemed incomplete as filed. Application #4C0288-19F was deemed complete on December 13, 2018 upon the receipt of supplemental information. On December 20, 2018 the Commission issued a public notice for a hearing on Application #4C0288-19F with a January 10, 2019 hearing date.

Amendment Application #4C0288-19G was received on March 26, 2018 for modifications of the Applicant’s existing stormwater infrastructure including (i) a change in the outlet location of an existing stormwater pond (Wet Pond #1) to a level spreader and then to a Class II wetland which is contiguous to the Sunnyside Brook, and (ii) the conversion of existing Wet Pond #1 to a gravel wetland. This application was deemed incomplete as filed; after additional materials were filed, it was deemed complete on December 3, 2018. On November 29, 2018 the Commission issued a public notice for Application #4C0288-19G under Act 250 Rule 51 for minor applications.

In a Memorandum of Decision and Notice of Consolidation of Applications and Prehearing Conference dated January 4, 2019, Applications #4C0288-19F and #4C0288-19G were consolidated into a single proceeding pursuant to Act 250 Rule 18(C)(1) and the January 10, 2019 hearing date was converted into a prehearing conference (“Prehearing”) for the purpose of identifying contested facts and legal issues, discussing party status, and determining a hearing schedule for the consolidated amendment applications. The Prehearing was conducted pursuant to Act 250 Rule 16, with Chair Thomas A. Little presiding.

A Prehearing Conference Report and Order (“PHCRO”) for Applications #4C0288-19F and #4C0288-19G, was issued by the Commission on January 17, 2019. The PHCRO requested additional information from certain parties. The last piece of information requested in the PHCRO was received by the Commission on February 15, 2019.

Prehearing Conference Report and Order #2 (“PHCRO #2”) for Applications #4C0288-19F and #4C0288-19G, was issued by the Commission on April 25, 2019. PHCRO #2 made preliminary party status and Friends of the Commission determinations, rendered a decision on a motion regarding discovery issues, rendered a decision on a motion to reconsider the consolidation of Applications #4C0288-19F and -19G, and requested additional information from certain parties.

In a Memorandum of Decision on Vallee’s Motion to Alter and Notice of Public Hearing, dated June 7, 2019, the Commission rendered a decision on Vallee’s Motion to Alter, which had asserted that the Commission must issue a decision on Rule 34(E) prior to holding an evidentiary hearing. The Commission found it was most expeditious and equitable to hold a single hearing on Rule 34(E) issues and the merits of the applications. Accordingly, the Commission denied Vallee’s Motion to Alter and provided notice of a public hearing on both applications.

On June 26, 2019 and June 27, 2019, the District Commission held a public hearing (“Hearing”) for the two applications. The Commission conducted a site visit immediately preceding the June 26, 2019 hearing and placed its observations on the record. Pursuant to Act 250 Rule 13(B), the Commission recessed the hearing pending submittal of additional information by the Parties as set forth below.

The Commission issued a Hearing Recess Order (“HRO”) on July 16, 2019 that required the submittal of additional information by the parties. Within the HRO, the Commission bifurcated Applications #4C0288-19F and #4C0288-19G in order to continue to promote the most efficient review of these Applications. Accordingly, the Commission stated that it would issue a final decision for Application #4C0288-19F separate from a final decision on Application #4C0288-19G. A final decision for Application #4C0288-19G was issued on August 28, 2019.

In its Memorandum of Decision on Vallee’s Motion to Reconvene the Hearing and Notice of Hearing, dated September 6, 2019, the Commission rendered a decision to reconvene the hearing to take testimony regarding evidence that was submitted in response to the HRO, but denied Vallee’s request for the Commission to require the Applicant to submit additional evidence. On September 20, 2019, the Commission held a reconvened hearing for Application #4C0288-19F (“Reconvened Hearing”).

The Commission adjourned the Reconvened Hearing on February 26, 2020 after the completion of Commission deliberations.

As set forth below, the Commission finds that the Project complies with 10 V.S.A § 6086(a) (Act 250).

II. JURISDICTION

Jurisdiction attaches because the Project constitutes a material change to a permitted development or subdivision, and thus requires a permit amendment pursuant to Act 250 Rule 34.

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act (“APA”), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, “[t]he rules of evidence as applied in civil cases ... shall be followed” in contested cases. Under the Vermont Rules of Evidence, “(a) judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” V.R.E. 201(b); See *In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e).

Within the PHCRO #2 dated April 25, 2019, the Commission took official notice of previously issued state permits; Town Plans from the Town of Colchester; Regional Plans from the Chittenden County Regional Planning Commission; and documents on the official VTrans website (e.g., Road Classification list, High Crash Locations list, Traffic Impact Study Guidelines, Act 145 Transportation Impact Fee Guidance, Transportation Demand Management Guidance). No objections to this official notice was received within 30 days of the issuance of PHCRO #2.

The Commission will also take official notice of permit application, plans and exhibits for LUP permit #4C0288-19C and the fact that in 2018 Vallee and Timberlake filed a lawsuit challenging VTrans’ Diverging Diamond Interchange project at the Exit 16 interchange of I-89 (“Exit 16 Improvements”) under the federal National Environmental Assessment Protection Act (“NEPA”) subject to the filing of an objection on or before 30 days from the date of this decision pursuant to Act 250 Rule 6.

IV. AMENDMENT APPLICATION – RULE 34(E)

Whether the Applicant seeks to amend a critical permit condition

The threshold question on an amendment application is “whether the applicant proposes to amend a permit condition that was included to resolve an issue critical to the issuance of the permit.” Act 250 Rule 34(E)(1).

The Applicant seeks to amend Condition #29 of LUP #4C0288-19C, proposing to operate the Costco gas station only during certain off-peak traffic hours, until the roadway infrastructure work required by LUP #4C0288-19C has been completed. Based on Findings of Fact, Conclusion of Law and Order #4C0288-19C and LUP #4C0288-19C, compliance under Criteria 5 and 9(K) relied upon certain traffic mitigation conditions. The Applicant’s premise is that not operating the gas station during certain high volume periods fully mitigates the Criterion 5 concerns that led the Commission to impose Condition #29 of LUP #4C0288-19C.

Condition #29 of LUP #4C0288-19C states, as follows:

“29. The Permittees shall implement the following traffic mitigation measures:

- a. Permittees will construct or fund the construction of dual westbound left-turn lanes and an exclusive northbound right-turn lane at U.S. Route 7/Lower Mountain View Drive, and a second right-turn lane on the eastbound approach of Upper Mountain View Drive. The storage length for the westbound through/right-turn lane shall be increased from 170’ to 200’. Construction of the Lower Mountain View Drive and Upper Mountain View Drive improvements shall be made prior to occupancy of the warehouse expansion and utilization of the gas fueling stations unless the Exit 16 corridor improvements are under construction.*
- b. The Permittees shall pay a proportional fair-share monetary contribution towards the preferred mitigation and improvement strategy for the U.S. Route 7/I-89 interchange (also referred to as the Exit 16 corridor). The fair share calculation has been determined to be 11.4% of the cost of the improvements. The fair share cost will be based on the current Exit 16 corridor improvement project the cost of which has been estimated at \$5,100,000. Costs for the Lower Mountain View Drive and Upper Mountain View Drive improvements are part of the fair share monetary contribution. Any monies spent on the Lower Mountain View Drive and Upper Mountain View Drive improvements above the calculated fair share monetary contribution will be refunded to the Permittees by the Vermont Agency of Transportation after construction of the Exit 16 corridor improvements.*
- c. The fair share monetary contribution shall be paid to an account with the Vermont Agency of Transportation before the commencement of construction of the warehouse expansion or the fuel pump station unless the Permittee is constructing the Lower Mountain View Drive and Upper Mountain View Drive improvements.*
- d. The Permittees can open the warehouse expansion or gas fuel pumps only after the Vermont Agency of Transportation has submitted a complete Act 250 application for construction of the Double Crossover Diamond improvements for the U.S. Route 2/7 corridor.*
- e. If the Vermont Agency of Transportation has not commenced construction and made substantial progress toward completion of the Double Crossover Diamond improvements for the U.S. Route 2/7 corridor and the Permittees wish to open either the warehouse expansion or gas fuel pumps, then the Permittees shall pay for the evaluation and implementation of modified signal timings along the U.S. Route 2/7 corridor.”*

Condition #29a has not been implemented but is only required to be implemented prior to the construction of the warehouse expansion or the operation of the gas station unless the Exit 16 Improvements are under construction. Currently, the warehouse expansion has not been constructed and the gas station has been constructed but is not operating. The Exit 16 Improvements are not under construction due to on-going appeals and the fact that the required takings of certain privately owned land have not been accomplished. The Applicant proposes to modify Condition #29a to allow the operation of the gas station during non-peak traffic hours without completing the US Route 7/Lower Mountain View Drive improvements specified in

Condition #29a (“LMVD Improvements”) or having the Exit 16 Improvements underway. The Applicant asserts that the LMVD Improvements are not warranted if the gas station hours are limited to non-peak hours of operation. The Applicant proposes to fully implement this condition when full operation of the gas station is allowed. Condition #29a resolved an issue critical to the issuance of LUP #4C0288-19C because the project authorized therein would not comply with Criteria 5 and 9(K) without the permit condition.

Condition #29b has been modified by the Vermont Superior Court Environmental Division (“Environmental Court”) In Re: Costco Act 250 Land Use Permit, Decision on the Merits, No. 41-4-13 (Vt. Sup. Ct. Envtl. Div. Aug. 27, 2015). In summary, the Environmental Court stipulated that the Applicant is responsible for 20% of the cost of the LMVD Improvements and 7.1% of the cost of the Exit 16 Improvements. The Environmental Court acknowledged that the total cost of the LMVD Improvements is \$720,000 and the total cost of the Exit 16 Improvements is \$5,100,000. The Environmental Court further stipulated that if the Applicant fully funds and constructs the LMVD Improvements, then they will be afforded an opportunity to seek reimbursement from VTrans of monies spent above their fair-share contribution for the LMVD Improvements after construction is complete. Condition #29b is a critical condition that the Environmental Court has altered, but that the Applicant is not proposing to change.

Condition #29c has not been fully implemented. On December 5, 2018, the Applicant paid \$325,000 to VTrans which represents a portion of the required fair-share monetary contribution. This payment occurred after the commencement of construction of the gas station. The Applicant executed an agreement with VTrans and has made a separate assurance that additional sums of money will be paid to VTrans as a part of the mitigation. Exhibits #011, 012 and 013. The Commission acknowledges that the Environmental Court altered the amount of the Applicant’s fair-share fee, such that the Applicant is responsible for 20% of the cost of the LMVD Improvements and 7.1% of the cost of the Exit 16 Improvements. The Applicant shall pay the remainder of the required fair-share fee within 60 days of this decision. The Commission finds that the Applicant is not proposing to alter Condition #29c, but also has not fully implemented the condition.

Condition #29d has been Implemented. VTrans submitted an Act 250 application and was granted LUP #4C1271, 4C0676R-16, 4C0288-21, 4C0757-24 and 4C0471-7 (“LUP #4C1271”), authorizing the Exit 16 Improvements. The District Commission finds that the Applicant does not propose to change Condition #29d.

Condition #29e has not been implemented. The Applicant proposes to modify this condition to allow the operation of the gas station during non-peak traffic hours without completing the signal timing evaluation or implementation of new signal timings along the US Route 2/7 (“US 7”) corridor. The Applicant asserts that signal timing adjustments are not warranted if the gas station hours are limited to non-peak hours of operation. The Applicant also asserts that the signal timing would be ineffective if done under the current traffic flow patterns and would only be impactful when the additional LMVD Improvements are constructed. The Applicant proposes to implement this condition when full operation of the gas station is authorized. Condition #29e resolved an issue critical to the issuance of LUP #4C0288-19C because the project authorized therein would not comply with Criteria 5 and 9(K) without the permit condition.

Therefore, the Commission finds that the Applicant is proposing to change Condition #29a and #29e of LUP #4C0288-19C which are conditions critical to the issuance of LUP #4C0288-19C because the project authorized therein would not comply with Criteria 5 and 9(K) without these permit conditions.

Whether the Applicant seeks to relitigate a critical permit condition

The second factor that must be considered is whether the applicant “is merely seeking to relitigate the permit condition or to undermine its purpose and intent.”

The Applicant does not dispute that traffic mitigation for the Project remains necessary for peak traffic hours; however, the Applicant is proposing to alter its hours of operation on a temporary basis in order to reduce traffic impacts and achieve compliance with Criteria 5 and 9(K). Exhibits #011 and 038. In fact, the Applicant is not seeking to eliminate the critical permit condition, but requests to implement the condition on an alternate timeframe. Exhibit #038. The Commission finds that the Applicant is not seeking to undermine the purpose of the original traffic mitigation, given that the Applicant will complete the traffic mitigation required in LUP #4C0288-19C upon authorization of full operation of the gas station.

Therefore, the Commission concludes that in this instance, the Applicant is not merely seeking to relitigate a critical permit condition or undermine its purpose and intent.

Flexibility vs. Finality

Rule 34(E) requires the Commission to balance the need for flexibility against the need for finality, considering at least the following factors:

a. Changes in facts, law or regulations beyond the permittee’s control

Representations in testimony from VTrans during the #4C0288-19C proceedings indicated that the timeline for VTrans to construct the Exit 16 Improvements (including the LMVD Improvements) was anticipated in Spring/Summer 2014. Specifically, the pre-filed testimony of Rajnish Gupta of VTrans, dated July 11, 2012, stated as follows:

“At this point VTrans is still in the Preliminary design phase [of the Exit 16 Improvements]. Later this fall the Preliminary plans should be complete and [VTrans] will transition to purchasing the right-of-way needed to construct the [Exit 16 Improvements]. The schedule as it stands today shows construction beginning in the Spring/Summer of 2014.”

During the #4C0288-19C proceedings, it was reasonably foreseeable that the Act 250 permits for the Costco gas station and the VTrans Exit 16 Improvements would be delayed by appeals. Specifically, the Applicant’s proposed findings of fact, conclusions of law and order #4C0288-19C, dated November 14, 2012, stated as follows:

“...Tying the permit to actual construction of the Exit 16 improvements would effectively sentence a much needed public infrastructure project to a decade of permit

litigation with the opposing fuel stations. There are statements in the record from one or both of Costco's opposition indicating their intent to challenge the interchange improvements as a means of preventing a competitor from entering into the area."

Nevertheless, during the #4C0288-19C proceedings the Applicant proposed a traffic mitigation condition that required the construction of improvements. Specifically, the Findings of Fact, Conclusions of Law and Order #4C0288-19C, state as follows:

"The Applicants have proposed, and the Commission accepts, the following improvements as mitigation of the increased traffic that will be caused by the [#4C0288-19C] Project:

- 1. Costco will complete the improvements needed at the Lower Mountain View Drive/US 7 intersection, namely the construction of dual WB left-turn lanes and an exclusive NB right-turn lane.*
- 2. Costco will construct a second right-turn lane on the EB approach on Upper Mountain View Drive.*
- 3. Costco will increase the storage length for the WB through/right-turn lane on Lower Mountain View Drive from 170-feet to 200-feet.*
- 4. Costco will post signs asking drivers to not block the driveways of other businesses on Lower Mountain View Drive and the road in front of these driveways shall be crosshatched. The Commission does not adopt Vallee's suggestion that police be posted at these driveways.*
- 5. Costco will contribute \$720,000 toward the intersection improvements at Lower Mountain View Drive, Upper Mountain View Drive, and along the Exit 16 corridor, subject to reimbursement for its 'fair share' contribution above \$583,721."*

Given the likelihood of appeals, the Commission endeavored to decouple the Costco gas station project from the eventual Exit 16 Improvement project. Specifically, the Findings of Fact, Conclusions of Law and Order #4C0288-19C, state as follows:

"The Commission understands that construction of the Exit 16 improvements is not within the control of the Applicants. However, [the] Commission is not satisfied with the payment of mitigation only. Therefore, the Commission will condition any permit on completion of the Lower and Upper Mountain View Drive improvements and submittal by VTrans of a complete Act 250 application for the proposed Exit 16 improvements before operation of the gas pumps or warehouse expansion can begin. The Commission understands that submission of a complete Act 250 application does not mean that a permit for that project will be issued. However, the Commission does not want to create an incentive for opposition to the Exit 16 permit application by requiring issuance of a permit for the Exit 16 improvements."

The Applicant represents that due to the pending litigation brought by the Vallee and Timberlake appeals concerning the Exit 16 Improvements, VTrans has delayed condemnation proceedings for the right-of-way expansion. Exhibit #011. VTrans only formally started the condemnation proceedings in June 2019 and the ultimate length of those proceedings is unknown. Exhibits #029, 038 and 084.

The Commission acknowledges that during the LUP #4C0288-19C proceeding it was reasonably foreseeable that the Act 250 permits for the Costco gas station (LUP #4C0288-19C) and the VTrans Exit 16 Improvements (LUP #4C1271) would likely be appealed. However, during the LUP #4C0288-19C proceeding – the relevant, critical period – no party, nor the Commission, anticipated that VTrans would decline to exercise its authority to start condemnation proceedings for the right-of-way expansion. Further, the Commission finds that although it was reasonably foreseeable that the Act 250 permits for the Costco gas station (LUP #4C0288-19C) and the VTrans Exit 16 Improvements (LUP #4C1271) would likely be appealed, as articulated further below, the Commission concludes that this application has reached the point where the length of the delay in resolving those appeals has become unexpected.

The Commission acknowledges that no evidence has been presented that the Applicant pursued acquiring the rights-of-way on their own. However, the Commission finds that it is not reasonable to assume that the Applicant could have completed purchase of the necessary rights-of-way, including lands leased by Vallee, given the contentious and complicated nature of this dispute. Exhibit #038. Also, the Commission finds that it was outside of the Applicant's control to compel VTrans to proceed with condemnation proceedings for the right-of-way expansion, or other similar actions.

The Supreme Court recently decided portions, but not all, of the appeal for the Exit 16 Improvements, *In re Diverging Diamond Interchange SW Permit, Diverging Diamond Interchange 2019 VT 57 (8/30/2019)*, and remanded the balance of the appeal to the Environmental Division which held a trial in the matter on January 14-16, 2020. If the history of this proceeding is any guide, the non-prevailing party in the remand is likely to appeal to the Vermont Supreme Court. In 2018, Vallee and Timberlake filed an additional lawsuit challenging the Exit 16 Improvements under NEPA, seeking an injunction claiming that a NEPA Environmental Assessment is required before construction may occur. Exhibit #011. The continuing Act 250 litigation and the new federal NEPA litigation appear likely to cause significant additional delays to the implementation of the Exit 16 Improvements going forward.

Ultimately, the Applicant was hampered by the fact that they never controlled the land over-which the LMVD Improvements were to be constructed. Although appeals of the Act 250 permits for the gas station and the Exit 16 improvements were anticipated, it was not anticipated during the LUP #4C0288-19C proceeding that VTrans would delay taking the necessary rights-of-way due to those appeals. Also, it is not practical or reasonable, in the Commission's view, to expect that the Applicant could acquire the necessary rights-of-way on its own and thereby itself construct the required improvements. Given the pending litigation, the extended delay in the construction of the Exit 16 Improvements, and possibly the LMVD improvements, will almost certainly continue.

b. Change in technology, construction, or operations which necessitate the amendment

The Commission recognizes that there are no proposed changes in technology or construction of the gas station that would necessitate a land use permit amendment. However, the Applicant has presented an alternate means of operation to forgo operating the gas station during peak traffic times for an indefinite time, unless and until the mitigation conditions included in Condition #29 of LUP #4C0288-19C are fully implemented. Notably, the Applicant does not dispute the conclusion of Condition #29 of LUP #4C0288-19C and has expressed its commitment to fully satisfy Condition #29 prior to operating the gas station on a full-time basis as originally permitted. Therefore, the Applicant may not operate the gas station on the proposed part-time basis unless a land use permit amendment is issued authorizing it to do so. Simply put, a land use permit amendment is needed before the Applicant may effectuate the change in operations without violating LUP #4C0288-19C. Consequently, the Commission concludes that the Applicant is proposing a change in operations which necessitate an amendment to LUP #4C0288-19C. Finally, for the reasons stated above, the Commission finds that the Applicant's proposed change in operations responds to delays in resolving the pending appeals that were not reasonably foreseeable.

The Commission also recognizes that the original condition is not the only means to mitigate the traffic impacts. If operations are altered in such a manner that traffic impacts will be minimized or even eliminated for a period of time, then mitigation would not be warranted under those circumstances and a delay in implementing the original traffic mitigation until impacts are realized may be reasonable. The Commission agrees with the Applicant's assertion that, *"[t]he Parties can differ perhaps regarding what hours of operation are acceptable, but the fact is undisputable that there are hours that Costco can operate, which will have absolutely no adverse impact under Criteria 5 and 9K."* Exhibit #038.

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

The Applicant has presented an alternate means of operation to forgo operating the gas station during peak traffic times for an indefinite time, unless and until the mitigation conditions included in Condition #29 of LUP #4C0288-19C are fully implemented. At the first available opportunity the Applicant would implement the original traffic mitigation.

The Commission notes that the design of the gas station and the design of the LMVD Improvements have not substantially changed since the #4C0288-19C proceedings. The Commission is not persuaded that a temporary means of operation is a more efficient or effective means to mitigate the impact addressed by the original condition. At best, the alternate means of operation may temporarily delay the need for the original mitigation but would not alter the overall goal of the original mitigation.

d. Other important policy considerations, including the proposed amendment's furtherance

of the goals and objectives of duly adopted municipal plans

The Commission does not find that the Applicant's proposed change would further the goals and objectives of a duly adopted municipal plan, nor does it find that the proposed change would jeopardize those stated goals and objectives. No other important policy considerations were raised by any party.

- e. Whether there was manifest error on the part of the District Commission, the Environmental Board, or the Environmental Court in the issuance of the permit condition

No error by the Commission or the Environmental Court is alleged by any party.

- 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. Chapter 151 that may be affected by the proposed amendment

It is reasonable for neighboring landowners to rely upon the terms and conditions of a permit, or at least to rely on their right to be heard on an application to amend the permit. In re Eustance, No. 13-1-06 Vtec, Decision at 12 (2/16/07), Judgment Order (3/16/07), aff'd, 2007-156 (Vt. S. Ct. 3/13/09). See also, Re: Dr. Anthony Lapinsky and Dr. Colleen Smith, #5L1018-4/#5L0426-9-EB, FCO at 12 (10/3//03).

The Commission acknowledges that Vallee and Timberlake relied on the critical permit conditions in the prior Act 250 proceeding. Additionally, the Commission's decision was upheld by the Vermont Environmental Court In Re: Costco Act 250 Land Use Permit, Decision on the Merits, No. 41-4-13 (Vt. Sup. Ct. Env'tl. Div. Aug. 27, 2015), and by the Vermont Supreme Court In Re: Costco 2016 VT 86.

The Commission also acknowledges that the critical conditions were devised to mitigate impacts for the full operation of the gas station and the Applicant is now proposing to scale back operations of the gas station to reduce the traffic impacts evaluated under LUP #4C0288-19C. In addition, the Applicant proposes to fully implement Condition #29 of LUP #4C0288-19C when full operation of the gas station is authorized. Therefore, the Commission finds that the reliance would not be undermined, but that an alternate means of operation would be implemented in the interim and that at the first available opportunity the Applicants would implement the original traffic mitigation.

Therefore, after consideration of all the factors and a careful review of applicable law, the District Commission finds that pursuant to Act 250 Rule 34(E)(4), flexibility outweighs finality in these circumstances, so the amendment application will be considered on its merits.

V. PARTY STATUS AND FRIENDS OF THE COMMISSION

A. Parties by Right

Parties by right to Application #4C0288-19F pursuant to 10 V.S.A § 6085(c)(1)(A)-(D) who attended the Prehearing, Hearing and Reconvened Hearing are:

1. The **Applicant** was represented at the Prehearing by Mark Marchisano of Costco Wholesale Corporation; Mark Hall, Esq. of Paul, Frank + Collins, P.C.; Jeremy Matosky of Trudell Consulting Engineers; and Chris Tiesler of Kittelson & Associates. The Applicant was represented at the Hearing by the same individuals and Chris Stafford of Costco Wholesale Corporation. The Applicant was represented at the Reconvened Hearing by Mark Marchisano of Costco Wholesale Corporation; Mark Hall, Esq. of Paul, Frank + Collins, P.C.; and Chris Tiesler of Kittelson & Associates.
2. The **Vermont Agency of Transportation** (“VTrans”) was represented at the Prehearing by Jenny Ronis and Michael Lacroix and was represented at the Hearing by the same individuals and Christopher Clow. Jenny Ronis submitted entries of appearance dated January 9, 2019 and February 15, 2019. VTrans was not represented at the Reconvened Hearing. VTrans is a statutory party to this proceeding.
3. The **Vermont Agency of Natural Resources** (“ANR”) was not represented at the Prehearing, Hearing or Reconvened Hearing but Jennifer Mojo submitted entries of appearance dated January 9, 2019 and June 6, 2019. ANR is a statutory party to this proceeding.
4. The **Chittenden County Regional Planning Commission** (“CCRPC”) was represented by Sai Sarepalli at the Prehearing but was not represented at the Hearing or Reconvened Hearing. CCRPC is a statutory party to this proceeding.
5. The **Town of Colchester** was not represented at the Prehearing, Hearing or Reconvened Hearing; however, the Town is a statutory party to this proceeding. Due to the complicated nature of the Application, the Commission will include the Town of Colchester in all correspondence.

In addition to the statutory parties listed above, Aaron Brondyke of the Natural Resources Board (“NRB”) attended the Prehearing, Hearing and Reconvened Hearing; Evan Meenan of the NRB attended the Hearing and Reconvened Hearing; and Dani Bradtmiller of the NRB attended the Hearing.

B. Interested Parties

Any person who has a particularized interest protected by Act 250 that may be affected by an act or decision of the Commission is entitled to party status pursuant to 10 V.S.A. §6085(c)(1)(E). To obtain party status a person must demonstrate that he or she has such a particularized interest, that the interest is protected by the Act 250 Criteria under which he or she seeks party status, and that there is a reasonable possibility that the Commission’s decision may affect that interest. The showing of this reasonable possibility must be based on more than mere speculation or theory. In evaluating requests for party status, the Commission notes that the standard for party status does not mean that the petitioner must prove that it will likely prevail on the merits of its case. The relevant inquiry is whether the petitioner may be impacted by the project under one or more specific criteria of Act 250.

i. Preliminary Party Status Determinations

At the Prehearing and in response to the PHCRO, dated January 17, 2019, the Commission allowed non-parties to submit petitions for party status for Application #4C0288-19F. Pursuant to Act 250 Rule 14(E), the Commission made preliminary determinations concerning party status in writing prior to the hearing in PHCRO #2, dated April 25, 2019. The following persons requested party status pursuant to 10 V.S.A § 6085(c)(1)(E), and were either admitted as parties or denied party status, as indicated below:

6. **R.L. Vallee, Inc.** ("Vallee") was represented at the Prehearing by Otto Hansen of Vallee; A.J. LaRosa, Esq. of Murphy Sullivan Kronk; and Jon Anderson, Esq. of Primmer, Piper, Eggleston & Cramer, P.C. Vallee submitted a written party status request on December 27, 2018. Exhibit #017. At the Prehearing, Vallee requested the right to submit additional information regarding party status under Criteria 5, 9(K) and 10. Vallee submitted a written supplemental filing for party status on February 4, 2019. Exhibit #030. At the Hearing, Vallee was represented by A.J. LaRosa, Esq.; Jon Anderson, Esq.; Jim Fuda and Steve Ulman of Alfred Benesch & Co.; Carroll Bean; and Yvon Dandurand. At the Reconvened Hearing, Vallee was represented by A.J. LaRosa, Esq.

Criteria 5 and 9(K)

Vallee owns a property located at 414 US Route 7 which fronts on US Route 7. Vallee has a driveway that proceeds across the southerly adjoining property and intersects with Lower Mountain View Drive. This driveway area is owned by Lake Champlain Transportation Company and is leased by Vallee. Exhibits #017 and 030. Previous traffic studies for projects in the area have indicated that queuing can occur and in turn can affect the function of intersections in the area. The Applicant did not oppose the preliminary granting of party status to Vallee under Criteria 5 and 9(K). The Commission preliminarily granted Vallee party status under Criteria 5 and 9(K).

Criterion 10

Every citizen of a town where a project is proposed can claim a direct interest, distinct and different from the public in general, in the efficacy and viability of his or her town plan, an interest in seeing that such town plan is respected. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 7 (Vt. Env. Bd. October 8, 2003); and see, *McLean Enterprises Corp.*, #2S1147 1-EB, Memorandum of Decision at 7 (Vt. Env. Bd. September 19, 2003). Individuals and corporations seeking party status under Criterion 10 still need to show that they have a particularized interest and that there is a reasonable possibility that the Commission's decision may affect that interest. The Applicant did not oppose the preliminary granting of party status to Vallee under Criteria 10. The Commission preliminarily granted Vallee party status under Criterion 10.¹

¹ Party status issues under Criterion 10 are different from those which arise under other criteria. The Commission needs not, and usually does not, hear "evidence" as to what a town plan "means." 10 V.S.A. § 6086(a)(10). Rather, the document, the town plan, speaks for itself. Participation by persons with Criterion 10 party status is usually limited to presenting facts regarding the project as they relate to compliance with the plan and legal argument as to whether the project complies with the criterion. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 6 - 7 (Vt. Env. Bd. October 8, 2003).

7. **Timberlake Associates, LLP** (“Timberlake”) was represented at the Prehearing by David Grayck, Esq. of the Law Office of David Grayck; and Tony Stout of Lakeside Environmental Group, LLC. At the Prehearing, Timberlake requested the right to submit a written petition for party status under Criteria 5, 9(K) and 10. On February 1, 2019, Timberlake submitted a written party status request for Criteria 5, 9(K) and 10. Exhibit #027. Timberlake was represented at the Hearing by David Grayck, Esq. and David McQuade, and was represented at the Reconvened Hearing by David Grayck, Esq.

Criteria 5 and 9(K)

Timberlake owns land on US 7, south of the intersection with Interstate 89 (“I-89”). Previous traffic studies for projects in the area have indicated that queuing can occur and in turn can affect the function of intersections in the area. The Applicant did not oppose the preliminary granting of party status to Timberlake under Criteria 5 and 9(K). The Commission preliminarily granted Timberlake party status under Criteria 5 and 9(K).

Criterion 10

Every citizen of a town where a project is proposed can claim a direct interest, distinct and different from the public in general, in the efficacy and viability of his or her town plan, an interest in seeing that such town plan is respected. *Re: John J. Flynn Estate and Keystone Development Corp.*, #4C0790-2-EB, Memorandum of Decision at 7 (Vt. Env. Bd. October 8, 2003); and see, *McLean Enterprises Corp.*, #2S1147 1-EB, Memorandum of Decision at 7 (Vt. Env. Bd. September 19, 2003). Individuals and corporations seeking party status under Criterion 10 still need to show that they have a particularized interest and that there is a reasonable possibility that the Commission’s decision may affect that interest. The Applicant did not oppose the preliminary granting of party status to Timberlake under Criterion 10. The Commission preliminarily granted Timberlake party status under Criterion 10.²

ii. Final Party Status Determinations

Prior to the close of hearings, the District Commission re-examined the preliminary party status determinations in accordance with 10 V.S.A § 6086(c)(6) and Act 250 Rule 14(E) and found no reason to change its preliminary determinations. However, no party offered testimony, facts, legal arguments or other evidence under Criterion 10; therefore, the Commission does not consider Criterion 10 to be at issue in this proceeding.

C. Friends of the Commission

No requests for Friends of the Commission status were made.

VI. MOTION ON ADMISSION OF EVIDENCE

During the Hearing the Applicant presented several videos depicting examples of the flow of traffic at the intersection of Lower Mountain View Drive and US 7. Exhibit #087. At the Hearing and in written comments, Vallee and Timberlake objected to the admission of this evidence. Exhibit #090. At the Hearing, the Commission allowed the Applicant to introduce the new evidence but

² See footnote 1, *supra*.

deferred its final ruling on whether it would admit the evidence, or not. The Commission has reflected on the value of the videos. The videos are admitted into the record and the Commission will give them the weight they deserve.

During the Hearing the Applicant requested to use Mr. Chris Clow, Transportation Engineer for VTrans, as a witness. Vallee and Timberlake objected to the Applicant's request because if the Applicant used Mr. Clow as a witness, the scope of Mr. Clow's testimony would extend beyond the scope of his pre-filed testimony. At the Hearing, the Commission ruled that Mr. Clow's testimony was allowable as a rebuttal witness to Vallee's experts and the questions would likely be addressed during cross examination or redirect. No party objected to the Commission's decision at the Hearing.

VII. PROCEDURAL HISTORY

LUP #4C0288-19

LUP #4C0288-19 was issued on February 19, 1993 and authorized the demolition of a 21,000 square foot ("sf") building on Lots #30 and #31 of the Meadows Industrial Park and the construction of a 118,491 sf warehouse/retail building on Lots #8 and #27-31 of the Meadows Industrial Park. LUP #4C0288-19 authorized a maximum of 462 PM peak hour trips and 869 trips during the Saturday noon hour.

LUP #4C0288-19A

LUP #4C0288-19A was issued on July 24, 1998 and authorized the construction of a 3,325 sf tire sales addition and a 1,064 sf food service addition to the existing warehouse. LUP #4C0288-19A authorized 479 PM peak hour trips and 894 trips during the Saturday noon hour. Condition #8 of LUP #4C0288-19A states as follows:

Condition #8: "The Permittee shall monitor the US 7/Mountain View Drive intersection approximately 6 months after the completion of the building additions approved herein to determine whether the intersection is functioning with an acceptable level of service. The study should consist of the capacity analysis of the intersection based on recent turning movements of the PM peak (3:00-6:00) and Saturday noon peak hours. The Permittees shall submit the traffic report to the District Commission and to the Vermont Agency of Transportation for review."

The Applicant did not provide the analysis specified by Condition #8 of LUP #4C0288-19A within the requested time frame. The analysis required under Condition #8 of LUP #4C0288-19A was submitted in July 2009 pursuant to an assurance of discontinuance dated May 2009 (79-5-09 Vtec). Exhibits #077 and 079.

LUP #4C0288-19B

LUP #4C0288-19B was issued on June 23, 2009 and authorized the construction of a 14,080 sf expansion to the existing warehouse. LUP #4C0288-19B authorized 489 PM peak hour trips and 914 trips during the Saturday noon hour. Conditions #19-21 of LUP #4C0288-19B state as follows:

Condition #19: *“Costco shall be responsible for their share of any mitigation measures that are made during [to] the US 7 corridor in and around the I-89 Exit 16 Interchange to mitigate the existing adverse conditions (in re Pilgrim Partnership, 153 Vt. 594, 596 (1990)). Costco’s share would consist of the additional trips generated by Costco in proportion to the total of the additional trips generated by all other new or expanded developments in the area. The proportional share will be based on the Exit 16 Transportation Management Plan (2009) and the Town of Colchester and VTrans shall develop a methodology to determine the proportional share.”*

Condition #20: *“Occupancy of the expansion may not take place until the traffic mitigation required by LUP #4C0288-19A has been fully implemented.”*

Condition #21: *“As part of the mitigation for violations under LUP #4C0288-19A, Costco has agreed to perform the following:*

- *Costco shall perform a two week test period of the potential reroute. The reroute will convert Costco’s Lower Mountain View Drive access into an “entrance only” access during peak time periods and require traffic to exit the site via Hercules Drive.*
- *The traffic volumes in the Traffic Impact Study shall be updated to reflect 2009 average weekday peak hour volumes. This could be achieved by applying a factor to adjust the consultant's January turning movement counts to VTrans' August 2008 turning movement counts and then applying a 1% growth factor. Peak Hour Factors should be used in the analysis. South Park Drive (McDonald’s)/US 7; I-89 Exit 16 West/US 7; I-89 Exit 16 [incorrectly stated as Exit 17] East/US 7 and Rathe Road/US 7 intersections will be included in this updated analysis.*
- *Costco shall have their traffic consultant conduct peak hour turning movement counts towards the end of the two week trial. The consultant shall then update their Synchro® model with these volumes, as well as update the model with any signal timing changes that are made for the re-route. The results shall be compared with the “no-build” alternative in terms of queuing, v/c, delay and LOS and submitted to VTrans for review and comment.*
- *Costco shall implement an Inspection Agreement with VTrans in an amount up to \$5,000 to recover the costs of VTrans resources to monitor the reroute.”*

LUP #4C0288-19B was appealed (143-709 Vtec) and ultimately was never constructed. By agreement of the parties, jurisdiction over the permit was remanded back to the Commission by an order of the Environmental Court dated April 5, 2010.

LUP #4C0288-19C

LUP #4C0288-19C³ was issued on January 24, 2013 and authorized the merging of an undeveloped parcel with the existing developed parcel; construction of a 14,080 sf expansion to

³ Commissioner McNamara dissented with the conclusions of LUP #4C0288-19C and Findings of Fact, Conclusions of

the existing warehouse; modify Conditions #19-21 of LUP #4C0288-19B; construction of a three-island (12 fueling position) gas station as an ancillary use to the warehouse with a 75 sf controller building; reconfigure the existing parking lot; adjust a boundary line with the abutting property to realign the private driveway; and construct a new stormwater system. LUP #4C0288-19C authorized a maximum of 730 PM peak hour trips. The warehouse expansion and gasoline fueling station were estimated to generate 155 net new PM peak hour trips which accounts for pass-by trips and internal capture trips. The gas station on its own accounts for 140 net new PM peak hour trips.

Condition #29 of LUP #4C0288-19C states as follows:

Condition #29: *"The Permittees shall implement the following traffic mitigation measures:*

- a. *Permittees will construct or fund the construction of dual westbound left-turn lanes and an exclusive northbound right-turn lane at U.S. Route 7/Lower Mountain View Drive, and a second right-turn lane on the eastbound approach of Upper Mountain View Drive. The storage length for the westbound through/right-turn lane shall be increased from 170' to 200'. Construction of the Lower Mountain View Drive and Upper Mountain View Drive improvements shall be made prior to occupancy of the warehouse expansion and utilization of the gas fueling stations unless the Exit 16 corridor improvements are under construction.*
- b. *The Permittees shall pay a proportional fair-share monetary contribution towards the preferred mitigation and improvement strategy for the U.S. Route 7/I-89 interchange (also referred to as the Exit 16 corridor). The fair share calculation has been determined to be 11.4% of the cost of the improvements. The fair share cost will be based on the current Exit 16 corridor improvement project the cost of which has been estimated at \$5,100,000. Costs for the Lower Mountain View Drive and Upper Mountain View Drive improvements are part of the fair share monetary contribution. Any monies spent on the Lower Mountain View Drive and Upper Mountain View Drive improvements above the calculated fair share monetary contribution will be refunded to the Permittees by the Vermont Agency of Transportation after construction of the Exit 16 corridor improvements.*
- c. *The fair share monetary contribution shall be paid to an account with the Vermont Agency of Transportation before the commencement of construction of the warehouse expansion or the fuel pump station unless the Permittee is constructing the Lower Mountain View Drive and Upper Mountain View Drive improvements.*
- d. *The Permittees can open the warehouse expansion or gas fuel pumps only after the Vermont Agency of Transportation has submitted a complete Act 250*

application for construction of the Double Crossover Diamond improvements for the U.S. Route 2/7 corridor.

- e. *If the Vermont Agency of Transportation has not commenced construction and made substantial progress toward completion of the Double Crossover Diamond improvements for the U.S. Route 2/7 corridor and the Permittees wish to open either the warehouse expansion or gas fuel pumps, then the Permittees shall pay for the evaluation and implementation of modified signal timings along the U.S. Route 2/7 corridor.”*

LUP #4C0288-19C was appealed to the Environmental Court In Re: Costco Act 250 Land Use Permit, Decision on the Merits, No. 41-4-13 (Vt. Sup. Ct. Env'tl. Div. Aug. 27, 2015) and to the Vermont Supreme Court In Re: Costco 2016 VT 86. The Commission's decision was upheld by the Environmental Court although that Court modified Condition #29b of LUP #4C0288-19C (see discussion in Section IV, above). The Environmental Court's decision was upheld by the Vermont Supreme Court.

LUP #4C0288-19E

LUP #4C0288-19E was issued on June 14, 2018 and authorized the construction of a 2,043 sf expansion to the existing warehouse for a produce cooler with minor modifications to the parking, striping and curbing near the building addition. LUP #4C0288-19E did not authorize a change to the maximum traffic trip capacities for the site.

LUP #4C0288-19G

LUP #4C0288-19G⁴ was issued on August 28, 2019 and authorized the modifications of existing stormwater infrastructure including a change in outlet location of Wet Pond #1 to a level spreader and then to a Class II wetland which is contiguous to the Sunnyside Brook, the conversion of existing Wet Pond #1 to a gravel wetland and associated stormwater improvement and construction of a 14,080 sf. expansion to the existing warehouse. LUP #4C0288-19G did not authorize a change to the maximum traffic trip capacities.

VIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Applicant has met the burden of proving compliance with the following criteria through submittal of the application. Therefore, the application shall serve as the Findings of Fact on these criteria.

- | | |
|---------------------------|-------------------|
| 1 - Air Pollution | 1(D) - Floodways |
| Water Pollution | 1(E) - Streams |
| 1(A) - Headwaters | 1(F) - Shorelines |
| 1(B) - Waste Disposal | 1(G) - Wetlands |
| 1(C) - Water Conservation | 2 - Water Supply |

⁴ Application #4C0288-19G was consolidated with Application #4C0288-19F in a Memorandum of Decision and Notice of Consolidation of Applications and Prehearing Conference dated January 4, 2019. The Applications were bifurcated in a Hearing Recess Order dated July 16, 2019 and a final decision for Application #4C0288-19G was separated from the final decision for Application #4C0288-19F.

- | | |
|--|--|
| 3 - Impact on Existing Water Supplies | 9(C) - Productive Forest Soils |
| 4 - Soil Erosion | 9(D) - Earth Resources |
| 6 - Educational Services | 9(E) - Extraction of Earth Resources |
| 7 - Municipal Services | 9(F) - Energy Conservation |
| 8 - Aesthetics | 9(G) - Private Utility Services |
| 8 - Natural Areas | 9(H) - Costs of Scattered
Development |
| 8 - Historic Sites | 9(J) - Public Utility Services |
| 8(A) - Wildlife Habitat & Endangered Species | 9(L) - Settlement Patterns |
| 9(A) - Impact of Growth | 10 - Local and Regional Plans |
| 9(B) - Agricultural Soils | |

The Findings of Fact are based on the application, exhibits, testimony and other evidence in the record. Findings made in this decision are not limited to the specific criterion in which they appear and may apply to other sections of the decision.

Under Act 250, projects are reviewed for compliance with the ten criteria of Act 250, 10 V.S.A § 6086(a)(1)-(10). Before granting a permit, the District Commission must find that the Project complies with these criteria and, therefore, is not detrimental to the public health, safety or general welfare. The burden of proof under Criteria 1 through 4 and 9 and 10 is on the applicant, and on the opponent under Criteria 5 through 8, and 9A if the municipality does not have a duly adopted capital improvement program.

**Criterion 5 – Transportation &
Criterion 9(K) – Development Affecting Public Investments:**

Findings of Fact

1. The Project tract is located on Lots #8 and #27-31 of the Meadows Industrial Park at 218 Lower Mountain View Drive in Colchester, Vermont. The Project tract currently includes a warehouse, gas station, and associated parking areas. Access to the Project tract is provided at three locations: (1) the terminus of Lower Mountain View Drive at the northwestern end of the tract, (2) a driveway to Hercules Drive at the northeastern end of the tract, and (3) a driveway to Hercules Drive just south of the warehouse at the southeastern end of the tract. In addition to the Project tract, Lower Mountain View Drive is developed with a mix of commercial uses (hotel, gas station and convenience store, bowling alley, credit union, restaurants, and commercial space) and Hercules Drive is developed with a mix of commercial and industrial uses. Exhibits #052 and 083.
2. The Costco gas station is accessible from a curb cut on Lower Mountain View Drive which leads to stacking lanes and the fueling bays. Mr. Chris Stafford testified at the Hearing that the gas station has a stacking capacity of approximately 60 cars. Egress from the gas station is through a curb cut into the main Costco parking lot allowing a driver to park or leave the property via Lower Mountain View Drive or Hercules Drive. Exhibit #083.
3. The Project's accesses are via Lower Mountain View Drive and Hercules Drive, both of which intersect with US 7. The I-89 intersection with US 7 ("Exit 16") is located to the west of the Project tract. Exhibits #083 and 085.

4. I-89 and US 7 are federal highways, Mountain View Drive, Hercules Drive and part of Lower Mountain View Drive are Town highways, and the extension of Lower Mountain View Drive is a private road. Exhibit #052.
5. The posted speed limit of US 7 south of Lower Mountain View Drive is 30 mph, the posted speed limit to the north is 40 mph. The posted speed limit on Lower Mountain View Drive is 25 mph. The posted speed limit on Hercules Drive is 30 mph. Exhibit #052.
6. In the 2011 TIS, the intersection of US 7/I-89 southbound ramp intersection was identified as a High Crash Location (“HCL”) pursuant to VTrans’ *High Crash Location Report: Sections and Intersections 2003-2007*. Exhibit #052. However, the current VTrans’ *High Crash Location Report: Sections and Intersections 2012-2016* lists the segment of US 7 from approximately 150 feet south of the Winooski City/Colchester Town line to approximately 140 feet north of the intersection of US 7/I-89 northbound ramp intersection as a HCL. Exhibit #056a. Between 2012-2016, this segment of US 7 reportedly had 109 crashes, 28 injuries and no fatalities. According to the *Exit 16 Circulation Study Final Report* (2009), the Lower Mountain View Drive intersection met the definition of a HCL. Exhibit #052 and 056a.

Level of Service (“LOS”)

7. The Applicant’s *Traffic Impact Analysis*, dated October 12, 2018 (“2018 TIA”) assessed the impacts of the Project at three study intersections; (1) the US 7/Lower Mountain View Drive/Mountain View Drive intersection (“Lower Mountain View Drive intersection”), (2) the US 7/I-89 northbound ramp intersection (“I-89 NB Ramps”), (3) the US 7/I-89 southbound ramp intersection (“I-89 SB Ramps”). Exhibit #022. The 2018 TIA analyzed traffic impacts beyond the PM peak hour, to establish which, if any, off-peak hours have conditions such that the traffic generated by the gas station could be accommodated in the roadway network within the established operation criteria. Exhibit #022.
8. To estimate the existing background traffic, the Applicant collected 31 hours of traffic turning movement counts in March of 2018 at the studied intersections on a typical weekday, Saturday and Sunday. This data was seasonally adjusted in accordance with the VTrans *Traffic Impact Study Guidelines* (2008). Exhibit #022.
9. To estimate the amount of traffic generated by the gas station in the weekday PM peak hour, the Applicant relied on the analysis presented in the Applicant’s *Transportation Impact Study*, dated March 31, 2011 (“2011 TIS”) and approved by the Commission under LUP #4C0288-19C. Exhibit #022. The 2011 TIS estimated that the gas station on its own will generate 140 net new PM peak hour trips when adjusted to discount for pass-by trips and internal capture. Exhibits #022 and 052. Diverted trips were not discounted from this analysis.
10. To estimate the daily/hourly activity of the gas station, the Applicant used door count data collected at the Costco Colchester warehouse for a three month period and door count data from five similar Costco locations. This data was used to estimate the hourly distribution of gas station trips as a percentage of the weekday PM peak hour (“distribution curve”). Exhibit #022. The weekday PM peak hour trips for the gas station were adjusted based on the distribution curve to estimate the number of trips for the gas station on an hour-by-hour basis. Exhibit #022.

11. At the June 26, 2019 Hearing, Mark Marchisano testified that Costco is a member-based retailer and its products and services are not available to the general public and that Costco does not experience a surge of new members after a gas station opens at an existing warehouse.
12. Vallee challenged the validity of the Applicant's analysis because the data collected from the five other Costco locations was not sourced from facilities that have limited hours of operation. Exhibits #056a and 067. Vallee requested that the Commission order the Applicant to limit hours of operations at one of their existing facilities so that the Applicant could provide direct data to draw from. Exhibit #067. The Commission did not find Vallee's request reasonable and did not require the Applicant to produce such data.
13. The Applicant completed a LOS analysis using Synchro software in accordance with the *Highway Capacity Manual Sixth Edition* ("HCM 6th edition") at each study intersection on an hour-by-hour basis, using the background traffic and the hourly gas station trips. Exhibit #022. The 2018 TIA assumed the following:
 - a. That all gas station trips will only enter and exit via Lower Mountain View Drive and will not utilize Hercules Drive. Exhibits #022 and 052.
 - b. The peak 15 minute traffic flow rate during each of the study periods was used in the evaluation of all intersection LOS. Therefore, the analysis reflects conditions that are likely to occur for the worst (i.e., highest traffic counts) 15 minutes out of every hour. During the remainder of the hour the intersection would operate better than estimated. Exhibit #022.
14. The 2018 TIA estimated that under existing conditions and without the operation of the gas station, in the weekday PM peak hour; the Lower Mountain View Drive intersection operates at an overall LOS "D"; the I-89 NB Ramps operates at an overall LOS "E"; and the I-89 SB Ramps operates at an overall LOS "C". Exhibit #022.
15. The 2018 TIA presented a comparison of the existing and proposed traffic at each studied intersection. The 2018 TIA assumed the following operating parameters; that the I-89 NB Ramps and I-89 SB Ramps will operate at an overall LOS "D" or better, that the Lower Mountain View Drive intersection will operate at an overall LOS "E" or better, and the overall LOS at each intersection will not degrade by more than two LOS levels as a result of the gas station operations. Exhibits #022 and 061. Based on the analysis and operating parameters, the Applicant proposed the following hours of operation; 6AM-2PM and 6PM-10PM on weekdays; 6AM-10AM and 2PM-10PM on Saturdays; and 6AM-10PM on Sundays. Exhibit #022.
16. VTrans found the Applicant's methodology used in the 2018 TIA to be reasonable. Exhibit #035. VTrans indicated, however, that the operating threshold applied to the overall LOS at the Lower Mountain View Drive intersection should be LOS "D" not LOS "E". The current overall LOS at the Lower Mountain View Drive intersection is "D" which VTrans has determined to be acceptable. Exhibit #035. By applying this revised standard, there would be no change to the operating hours for Sunday through Friday, but VTrans recommended that the operating hours for the gas station on Saturdays be limited to 6AM-10AM and 6PM-10PM. Exhibit #035.
17. The VTrans *Level of Service Policy* (2007) strives to design its highways and to require others accessing its facilities to effect improvements that will maintain an overall LOS "C"

for the prescribed design period, but a reduced overall LOS may be acceptable, when approved by the Secretary of Transportation or designee on a case-by-case basis, especially within densely settled areas. The VTrans *Level of Service Policy* (2007) also states that in extreme circumstances, where the existing overall LOS is less than desired and where the necessary geometric improvements are not feasible, a lower overall LOS may be acceptable, as long as the safety and mobility of the traveling public is improved. Exhibit #080.

18. The Commission finds that the Project is located in a densely settled area and a designee of the Secretary of Transportation has approved an overall LOS "D" for the studied intersections. Exhibit #035. The Commission also finds that an overall LOS "D" in developed areas in Chittenden County is commonplace and the Commission is not persuaded that an overall LOS "D" is an extreme circumstance.
19. The Project does not include the construction of improvements but does incorporate limited hours of operation. The VTrans *Traffic Impact Study Guidelines* (2008) lists staggered schedule for demand dampening and alternative work schedules as transportation demand management ("TDM") strategy.
20. Vallee challenged the validity of the Applicant's 2018 TIA because it does not account for the possibility that the persons who are denied the ability to purchase gas when the gas station is closed ("denied fuelings") would try to purchase gas at the gas station at any other time. Exhibits #056a and 067. Vallee and Timberlake testified that because the Applicant is selling gas at below market rates, customers who are denied fueling during closed hours will have a significant incentive to make a return trip to the gas station at another time when the gas station is open. Exhibit #056a. Vallee asserted that all of the denied fuelings must be reallocated to times when the gas station is open. Exhibit #056a. Vallee presented no empirical data supporting this assertion.
21. The Applicant testified that when most customers are denied the opportunity to purchase gas, they will find an alternate gas station to refuel based on necessity and/or convenience, and therefore it is extremely unlikely that all denied fuelings would return to the facility later time of day or day of week. Exhibit #065. The Applicant further argued that the majority of trips generated by a Costco gas station are already on the roadway network and/or shopping at the accompanying warehouse. Exhibit #022. Regardless, the Applicant completed an analysis that reallocates the denied fuelings proportionally based on the distribution curve. Exhibits #065, 065a and 097. The Applicant's hourly trip profile also eliminates pass-by trips because they are inherently time and space dependent and would not shift to other hours. Exhibits #065, 065a and 097.
22. The Commission is not persuaded by Vallee's argument that all, or even a significant portion, of members that are denied the opportunity to purchase gas would as a matter of course return to the gas station at a later time the same day or even another day in the same week. The Commission also notes that only members can purchase gas at the facility and that the Applicant can communicate with its members to attempt to avoid denied fuelings. By applying its experience and a good dose of common sense, the Commission finds that the denied fueling concern is simply not well founded, is highly speculative, and should be discounted. The Commission is persuaded by the Applicant's argument that purchasing gas is a matter of necessity and convenience.

23. Vallee further challenged that the Applicant's 2018 TIA did not include a LOS analysis that accounted for a permitted, but not yet operational, development at 18 Lower Mountain View Drive (LUP #4C0288-14-5B). Exhibits #090 and 094.
24. The traffic estimates available for the development at 18 Lower Mountain View Drive only accounted for the weekday AM and PM peak hours. Since the Applicant is not proposing to operate the gas station during the weekday PM peak hour, the Applicant completed an updated LOS analysis using the weekday AM peak hour data. Accounting for the traffic from 18 Lower Mountain View Drive and the gas station, the overall LOS of the Lower Mountain View Drive intersection in the weekday AM peak hour will be reduced to LOS "C" from LOS "B" under existing conditions. Exhibit #065.⁵
25. Vallee also contended that when the area is heavily congested, drivers take greater risks by reducing following distances and attempting to utilize smaller "gaps" between cars, which is the leading cause of accidents and produces more dangerous conditions. Exhibit #056a.
26. The Applicant states that congestion on a roadway is not the sole cause of crashes, and AASHTO's Highway Safety Manual ("HSM") does not identify congestion as a direct or statistically significant cause of crashes. Exhibit #065.

Queuing

27. The 2011 TIS indicates that queue spillback from the I-89 SB Ramp intersection (in particular the SB left-turn onto I-89) commonly occurs during the PM peak hour and impacts operations and queuing along the Exit 16 corridor through the I-89 NB Ramps and at the Lower Mountain View Drive intersection. Exhibit #052. This can manifest as traffic from one intersection backing up into another intersection, interfering with the operation of the second intersection. Exhibit #052.
28. The 2011 TIS indicates that queues presently already exist on Lower Mountain View Drive from vehicles which are attempting to access US 7. Vehicles line up in front of driveways used by other business located on Lower Mountain View Drive including the Credit Union owned by Sisters & Brothers and the Vallee property. Exhibit #052.
29. Vallee's property is located at 414 US 7. Vallee's property has direct access off US 7 via a curb cut and access to Lower Mountain View Drive via a leased driveway. Vallee's driveway intersects Lower Mountain View Drive approximately 260 feet east of the stop bar for Lower Mountain View Drive at US 7. Exhibit #056a and 070.
30. Vallee contended that the Project would exacerbate safety conditions because the Project would result in longer queues that occur more often. Exhibit #056a. Vallee states that the increase in queue lengths and waiting times result in more periods of visual blockage and decreased traffic safety for traffic accessing Vallee's driveway. Exhibits #056a and 095.
31. Based on the 2018 TIA, during the proposed hours of operation, the gas station traffic would not result in additional hours that the Vallee driveway is blocked by queuing on

⁵ The Commission notes that Exhibit #065 also used the denied fueling figures from the June 2019 hourly trip profile which was revised by the Applicant in August 2019. The June 2019 hourly trip profile, however, contained more total trips (and the same amount of net new trips) in the AM peak hour than the revised hourly trip profiles.

Lower Mountain View Drive with the exception of one hour each day (6PM hour on weekdays, 6PM hour on Saturdays and 10AM hour on Sundays). Exhibit #022.

32. The Applicant states that vehicle queueing on Lower Mountain View Drive is an existing condition that predominately occurs during peak periods when traffic volumes are highest. Exhibit #065. The Applicant also stated that at a signalized intersection of two roadways with different roadway classifications, there will typically be a greater delay on the lower classification roadway. Exhibit #073. Further, the Applicant contended that Vallee's driveway is within the functional area of the Lower Mountain View Drive intersection as defined by Association of Highway Transportation Officials ("AASHTO") *A Policy on Geometric Design of Highways and Streets, 6th Edition* (2011); as such, it is expected that queues on Lower Mountain View Drive would occasionally extend beyond the Vallee driveway. Exhibit #065.
33. At the Hearing, Mr. Yvon Dandurand and Mr. Carroll Bean, truck delivery drivers for Vallee, testified that the driveway exiting onto Lower Mountain View Drive is the safer means of egress for large fuel delivery trucks leaving the Vallee gas station. Mr. Dandurand also testified at the Hearing that when in a large delivery truck, he can see over vehicles on Lower Mountain View Drive, but to make a right-hand turn onto Lower Mountain View Drive from the Vallee driveway, large trucks may need to encroach into the eastbound lane of Lower Mountain View Drive due to the truck turning radius. Mr. Dandurand has driven for Vallee for approximately 18 years and Mr. Bean has driven for Vallee for approximately 10 years. Mr. Dandurand and Mr. Bean both testified that they are not aware of any traffic accidents from these truck turning movements at this location.
34. Vallee contends that the Applicant needs to construct the Lower Mountain View Drive Improvements specified in LUP #4C0288-19C, including the dual westbound left turn lanes on Lower Mountain View Drive, before commencing the gas station operations because the improvements were designed to address queues on Lower Mountain View Drive. Exhibit #056a.
35. The Applicant's 2011 TIS (Exhibit #052) which covered only the PM peak hour, states as follows:

"...[T]he [construction of dual westbound left-turn lanes at Lower Mountain View Drive intersection] will reduce the amount of time during the peak hour that the business access points within 200-feet of the US Route 7 signal [on Lower Mountain View Drive] are blocked by queue from 100% of the peak hour to 55% of the peak hour in the near-term."
36. The Commission's Findings of Fact, Conclusions of Law and Order #4C0288-19C, states as follows:

"...The dual left-turn lanes on Lower Mountain View Drive for vehicles accessing US 7 will not significantly improve the ability for vehicles to make left turns on to US 7, given that this movement is impacted by queue spillback from the I-89 SB Ramps, but they will improve queue storage on Lower Mountain View Drive for this movement."
37. The Commission's Findings of Fact, Conclusions of Law and Order #4C0288-19C, also states:

"The Commission should not permit projects that jeopardize or interfere with the function, efficiency or safety of the road. Regarding safety, the area where the majority

of the accidents occur is in the vicinity of the Interstate ramps. The posted speed limit here is 30 mph. It is not unreasonable to assume that these accidents are of the “fender bender” type rather than high speed collisions that could endanger lives. Therefore, although the increase in traffic will exacerbate safety issues, [the Commission] find[s] that it is not an endangerment of lives. However, it is not disputed that the increase will affect the efficiency of the corridor.

[The Commission] conclude[s] that the exacerbation caused by the Project’s increased trip generation will add to the congestion and queuing and may result in a decrease in speed traveled. Thus, the proposed Project will reduce the severity of endangerment (by vehicle collisions) but it will increase traffic congestion.”

38. The Commission finds that traffic queues already exist in the area and queues on Lower Mountain View Drive are partially a function of queue spillback from the I-89 interchange. Despite queues already existing on Lower Mountain View Drive, the Vallee drivers with 10 and 18 years of experience, respectively, are not aware of any traffic accidents on Lower Mountain View Drive related to trucks exiting the Vallee driveway.
39. The Commission also finds that the LMVD Improvements were proposed as a result of a traffic study that investigated only the weekday PM peak hour. The LMVD Improvements were only designed to add queue storage and would not alleviate blockage of the Vallee driveway during the entirety of the studied period (i.e. the weekday PM peak hour). The current Project does not result in additional hours that the Vallee driveway is blocked by queues with the exception of one hour each day.
40. The Commission also finds that the Findings of Fact, Conclusions of Law and Order #4C0288-19C and LUP #4C0288-19C acknowledged that the trip generation from the gas station will add somewhat to congestion and queuing and will reduce the severity of endangerment of lives due to the increase in traffic congestion and the Commission finds that the current Project will function in a similar way.

Mitigation

41. The Applicant’s admit that the Lower Mountain View Drive intersection improvements specified in Condition #29 of LUP #4C0288-19C will effectively mitigate the impacts of the gas station operation during the weekday PM peak hour. Exhibit #065. The Applicant reconfirms its commitment to the full mitigation as stated in Condition #29 of LUP #4C0288-19C before full-time hours of operation can occur. Exhibit #086.
42. The Applicant has provided payment of \$325,000 to VTrans as part of the mitigation required under Condition #29 of LUP #4C0288-19C and has executed a payment agreement with VTrans. Exhibit #012 and 086.
43. The Applicant proposes the following mitigation measures to operate the gas station during limited hours from 6AM-2PM and 6PM-10PM on weekdays; 6AM-10AM and 6PM-10PM on Saturdays; and 6AM-10PM on Sundays.
 - a. The Applicant will convey hours of operation directly to its members through direct mailers, on-site signage, the Costco’s website, and pre-opening advertisement campaign. Exhibits #022 and 086.
 - b. The Applicant will provide a staff person to oversee the functioning of the gasoline station during the hours of operation, including management of the gasoline

station, management of hours of operation and management of related traffic including the prevention of parking in wait on Lower Mountain View Drive.

- c. Chris Stafford, for the Applicant, testified that for the first month of gas station operation the Applicant would have the gas station staffed during off-hours to answer questions about operating hours and direct traffic away from the gas station during closed hours. Exhibit #086.
 - d. The Applicant will control hours of operation by having a staff person place a chain or other comprehensive barrier at the entrance and exit of the gasoline station and turning off the equipment. Exhibit #086.
 - e. Chris Stafford, for the Applicant, testified that if cars exceed the capacity of the gas station (approximately 60 cars), Costco staff will direct cars to the Costco parking lot to prevent queuing on Lower Mountain View Drive
 - f. The Applicant is willing to undertake a post-amendment study of its reduced-hours operations and adjust the hours of operation as the study may indicate. Exhibit #086.
44. VTrans was satisfied with the information the Applicant provided regarding traffic management and customer notification during opening and closing hours. Exhibit #035.
45. The Commission finds the mitigation conditions proposed by the Applicant to be acceptable with the following modifications:
- a. Prior to operation of the gas station, the Applicant shall post the hours of operation of the gas station on one unlit sign to be located near the entrance to the gas station on Lower Mountain View Drive and on one unlit sign to be located near the gas station attendant booth.
 - b. During the hours of operation of the gas station, the Applicant shall provide a staff person to oversee the management of hours of operation of the gas station and management of related traffic including the prevention of parking in wait for the gas station on Lower Mountain View Drive.
 - c. For the first month of the gas station operations, the Applicant shall provide a staff person to oversee the functioning of the gas station during hours when the warehouse is open but the gas station is closed to prevent customers from parking in wait for the gas station on Lower Mountain View Drive.
 - d. The Applicant shall control the hours of operation of the gas station by having a staff person place a chain or other comprehensive barrier at the entrance and exit of the gas station and turning off the gas station pumping equipment.
 - e. The Applicant shall complete and submit a traffic monitoring study. The monitoring study shall include conducting turning movement counts between 6-9 months from the commencement of gas station operations. At a minimum the study shall analyze the level of service, delay, queue lengths and crash records at the studied intersections. The traffic monitoring study shall be submitted to VTrans and the Act 250 District Commission within one year of the commencement of gas station operation.

Conclusions of Law – Criterion 5

Criterion 5(A) requires that the Project “will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.” See 10 V.S.A § 6086(a)(5)(A). Notwithstanding the requirement for a positive finding, the Commission may not deny a permit solely on the reasons set forth under Criterion 5. See 10 V.S.A § 6087(b). The Commission may, however, attach reasonable conditions to alleviate traffic burdens. *Id.*

After reviewing all of the evidence, the Commission is more persuaded by the Applicant and VTrans than it is by Vallee and Timberlake. As conditioned herein, the Commission concludes that the Project will not cause unreasonable congestion or unsafe conditions with respect to use of roads, highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

Criterion 5(B) requires that a project, “as appropriate . . . incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services.” 10 V.S.A § 6086(a)(5)(B). In determining what is appropriate for a particular project, the Commission considers whether measures are reasonable, “given the type, scale and transportation impacts” of the proposed project. *Id.*

After reviewing all of the evidence, the Commission is persuaded by the Applicant that the limited hours of operation meet the definition of a TDM measure, as listed in the VTrans *Traffic Impact Study Guidelines* (2008). The Commission finds these measures reasonable given the type, scale and transportation impacts of the Project.

The Commission concludes that the Project complies with Criterion 5(A) and Criterion 5(B).

Conclusions of Law – Criterion 9(K)

Criterion 9(K) applies to projects that are adjacent to governmental and public utility facilities, services, or lands. With regard to such projects, the applicant bears the burden of proving that the project will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public’s use or enjoyment of or access to the facility, service or lands.. 10 V.S.A § 6086(a)(9)(K).

Analysis under Criterion 9(K) call for two separate inquiries with respect to public facilities, i.e. public roads. First, the Commission examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities. Second, the Commission examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or safety of such facilities or (b) the public’s use or enjoyment of or access to such facilities. *Swain Development Corp. and Philip Mans, #3W0445-2-EB*, Findings of Fact, Conclusions of Law and Order at 33 (Vt. Env. Bd. October 11, 1990).

After reviewing all of the evidence, the Commission is more persuaded by the Applicant than it is by Vallee and Timberlake. As conditioned herein, the Commission concludes that the Project will not unnecessarily or unreasonably endanger public investment in the adjacent public roadways and does not materially jeopardize or interfere with the function, efficiency or safety of the roadways, or the public's use or enjoyment of access to the roadways.

The Commission concludes that the Project complies with Criterion 9(K).

IX. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes that the Project, if completed and maintained as represented in the application and other representations of the Applicant, and in accordance with in the findings and conclusions of this decision and the conditions of Land Use Permit #4C0288-19F, will comply with the Act 250 criteria. 10 V.S.A § 6086(a).

X. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #4C0288-19F is hereby issued.

DATED at Essex Junction, Vermont, this 28th day of February 2020.

By /s/Thomas A. Little, Chair
Thomas A. Little, Chair
District #4 Commission

Commissioners participating in this decision:
Parker Riehle
James McNamara

Any party may file a motion to alter with the District Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A).

Any appeal of this decision must be filed with the Superior Court, Environmental Division within 30 days of the date the decision was issued, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must comply with the Vermont Rules for Environmental Court Proceedings. The appellant must file with the Notice of Appeal the relevant entry fee required by 32 V.S.A. § 1431.

The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, 10 Baldwin Street, Montpelier, VT 05633-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

Decisions on minor applications may be appealed only if a hearing was held by the district commission. Please note that there are certain limitations on the right to appeal, including appeals from Administrative Amendments and interlocutory appeals. See 10 V.S.A. § 8504(k), 3 V.S.A. § 815, and Vermont Rule of Appellate Procedure 5.

Findings of Fact, Conclusions of Law, and Order 4C0288-19F
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For additional information on filing appeals, see the Court's website at:
<http://www.vermontjudiciary.org/GTC/environmental/default.aspx> or call (802) 951-1740. The Court's mailing address is: Vermont Superior Court, Environmental Division, 32 Cherry Street, 2nd Floor, Suite 303, Burlington, VT 05401.

Y:\NRB\Essex\DISTRICTS\DIST4\PROJECTS\4C0251-4C0500\4C0288\4C0288-19\4C0288-19F\Published Documents\District Commission Documents\4C0288-19F Findings final.docx

Exhibit List



Application #	4C0288-19F (2/18/20)
Applicant(s)	Costco Wholesale Corporation - Mark Marchisano
Landowner(s)	Same
Project Town(s):	Colchester

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
000		000 Exhibit List	Applicant
001	7/24/18	001 Act 250 Application	Applicant
002	"	002 Cover Letter Dated July 24, 2018	"
003	"	003 Abutters List	"
004	"	004 Project Location Map	"
005	"	005 Traffic Impact Memorandum - KAI (7/18/18)	"
006	"	006 Previous Land Use Permit #4C0288-19C - Expansion (1/24/18)	"
007	"	007 Previous Land Use Permit #4C01271, #4C0676R-16, 4C0288-21, #4C0757-24, #4C0471-7 - Diverging Diamond Interchange (11/28/16)	"
008	8/6/18	008 Court Order (8/27/15)	"
009	"	009 Letter by J. Matosky (8/6/18)	"
010	"	010 Stormwater Discharge (March Term, 2016)	"
011	12/13/18	011 Cover Letter by Mark Hall, Esq. re Additional Information (12/13/18)	"
012	"	012 Exhibit 1 Showing Agreement Between State of Vermont and Costco (11/30/18)	"
013	"	013 Letter by M. Hall re Costco's Check re Mitigation Payment - Traffic (12/5/18)	"
014	"	014 Route 7 and Lower Mountain View Drive ROW Plans	"
015	"	015 Traffic Impact Memorandum - KAI Revised 10-12-18	"
016	12/27/18	016 Letter by Alexander J. LaRosa, MSK re Motion for Party Status from R.L. Vallee (12/27/18)	Opponent
017	"	017 Motion for Party Status by Jon Anderson, Esq., Primmer Piper Eggleston & Cramer and A.J. LaRosa, MSK Attorneys for R.L.Vallee (12/27/18)	"
018	1/4/19	018 Letter by A.J. LaRosa re Scheduling - Applications 4C0288-19F/4C0288-19G (1/4/19)	"
019	1/8/19	019 Email by R. Lomonaco to Mark Hall re Traffic Impact Analysis Color Version (1/8/19)	Act 250
020	"	020 Memorandum Concerning Scheduling by J. Anderson & A.J. LaRosa on behalf of R.L. Vallee (1/8/19)	Opponent

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
021	1/9/19	021 Entry of Appearance by Jenny Ronis, Assistant Attorney General, VTrans (1/9/19)	VTrans
022	"	022 Traffic Impact Memo in Color (10/12/18)	Applicant
023	"	023 Entry of Appearance by Jennifer Mojo and Elizabeth Lord, Esq., ANR (1/9/19)	ANR
024	"	024 Motion to Reconsider and Objection to Standing for Minor Application for Stormwater Change and Objection to Standing Under any Related Criteria by Mark Hall, Esq.--Costco (1/9/19)	Applicant
025	"	025 Response to R.L. Vallee's Scheduling Memorandum by Mark Hall, Esq.--Costco (1/9/19)	"
026	1/11/19	026 Prehearing Sign In Sheet (1/10/19)	Act 250
027	2/1/19	027 Party Status Petition and Memorandum of Law Regarding Rule 34(E) by Timberlake Associates (2/1/19)	Opponent
028	2/4/19	028 Cover Letter by A.J. LaRosa re Costco Request to Waive Permit Conditions (2/4/19)	"
029	"	029 Memorandum Concerning Act 250 Rule 34(E) by J. Anderson & A.J. LaRosa on behalf of R.L. Vallee (2/4/19)	"
030	"	030 Supplement to Motion for Party Status with Affidavit by J. Anderson & A.J. LaRosa on behalf of R.L. Vallee (2/4/19)	"
031	"	031 Cover Letter by Mark Hall (2/4/19)	Applicant
032	"	032 Costco's Supplemental Briefing Relative to the Commission's January 17, 2019 Prehearing Conference Report and Order and Act 250 Rule 34(E) Regarding Criterion 5 (2/4/19)	"
033	"	033 Costco Wholesale Corporation's Supplemental Opposition to Consolidation (2/4/19)	"
034	2/14/19	034 Reply to Costco's Filing by Timberlake Associates (2/13/19)	Opponent
035	2/15/19	035 VTrans Response to Costco's Supplemental Briefing Regarding Criterion 5 (2/15/19)	VTrans
036	"	036 R.L. Vallee Inc.'s Response to Costco's February 4, 2019 Filing by J. Anderson and A.J. LaRosa (2/15/19)	Opponent
037	"	037 Costco Rebuttal Brief re Minor Application for Changes in Stormwater System (2/15/19)	Applicant
038	"	038 Costco Rebuttal to Oppositions Motion on NRB Rule 34(E) (2/15/19)	"
039	"	039 Costco Supplemental Response to R.L. Vallee Memo re Scheduling (2/15/19)	"
040	"	040 Letter to R. Lomonaco by M. Hall re Costco Rebuttal (2/15/19)	"
041	5/10/19	041 R.L. Vallee's Response to the Commission's Request for Information Regarding Act 145 (5/10/19)	Opponent
042	"	042 Cover Letter by A.J. LaRosa re R.L. Vallee's Response to Commission's Request for Information and Motion to Alter RHCRO #2 (5/10/19)	"
043	"	043 Motion to Alter April 25, 2019 Prehearing Conference Report and Order #2 (5/10/19)	"
044	5/21/19	044 Letter by A.J. LaRosa re R.L. Vallee Available Dates (5/21/19)	"
045	"	045 Letter by David Grayck re Timberlake Available Dates (5/21/19)	"
046	5/22/19	046 Letter by Jenny Ronis re VTrans Available Dates (5/22/19)	VTrans
047	"	047 Letter by Mark Hall re Costco Available Dates (5/22/19)	Applicant
048	"	048 Costco's Opposition to R.L. Vallee's Motion to Alter (5/22/19)	"
049	5/24/19	049 VTrans Memo on Act 145 Traffic Impact Fees and Pre-Filed Direct Testimony of Christopher Clow (5/24/19)	VTrans

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
050	5/28/19	050 Cover Letter by A.J. LaRosa, MSK re R.L. Vallee's List of Proposed Witnesses, Prefiled Testimony from Expert Witnesses and Memorandum Regarding Need for a Weir (5/28/19)	Opponent
051	"	051 R.L. Vallee Proposed Witness List (5/28/19)	"
052	"	052 Appendix to Prefiled Testimony - Reduced	"
053	"	053 Prefiled Testimony of David Spear, PE, MSCE (5/29/19)	"
054	"	054 Memo re "Weir" in Gravel Wetland (5/28/19)	"
055	"	055 Prefiled Testimony of James Fuda, VT PE #05580 (5/28/19)	"
056	"	056 Prefiled Testimony of Stephen Ulman, PE, PTOE (5/28/19)	"
056a	6/17/19	056a Corrected Prefiled Testimony of Stephen Ulman, PE, PTOE (5/29/19) and Attachment A (6/17/19)	"
057	5/28/19	057 Filing by Timberlake Associates Pursuant to Prehearing Conference Report and Order No. 2 (5/28/19)	"
058	5/29/19	058 Cover Letter by Mark Hall, Esq. re Brief on Act 145, Witness List, and Prefiled Testimony (5/29/19)	Applicant
059	"	059 Costco Brief on the Applicability of Act 145 Memo of Law by Mark Hall, Esq. (5/29/19)	"
060	"	060 Costco Witness List and Summary of Testimony by Mark Hall, Esq., Paul Frank + Collins (5/29/19)	"
061	"	061 Prefiled Testimony of Chris Tiesler, PE - Criteria 5 and 9(K) (5/29/19)	"
062	6/6/19	062 ANR Comments re Stormwater System (6/6/19)	ANR
063	6/7/19	063 Cover Letter by Mark Hall re Response to Prehearing and Conference Report and Order #2 (6/7/19)	Applicant
064	"	064 Costco Rebuttal Brief Regarding Minor Application for Changes in Stormwater System (6/7/19)	"
065	"	065 Rebuttal Prefiled Testimony of Chris Tiesler, P.E. - Criteria 5, 9K, and 10 (6/7/19)	"
065a	7/25/19	065a Revised Table 3 (7/23/19)	"
066	6/7/19	066 Cover Letter by A.J. LaRosa re R.L. Vallee's Response to Memos Concerning Act 145 Prefiled Testimony and Rebuttal Prefiled Testimony of Stephen Ulman (6/7/19)	Opponent
067	"	067 R.L. Vallee's Response to Memos Concerning Act 145 Prefiled Testimony Filed by VTrans and Costco (6/7/19)	"
068	"	068 Prefiled Rebuttal Testimony of Stephen Ulman, P.E., PTOE (6/7/19)	"
069	6/17/19	069 Cover Letter by A.J. LaRosa re Costco Request to Waive Permit Conditions (6/17/19)	"
070	"	070 Responsive Testimony of Stephen Ulman, PE, PTOE and Attachment A (6/17/19)	"
071	6/19/19	071 Cover Letter by Mark Hall re Additional Prefiled Testimony and Witness List (6/19/19)	Applicant
072	"	072 Costco Prefiled Sur-Reply Testimony of Chris Tiesler, PE (6/17/19)	"
073	"	073 Costco Supplemental Witness Testimony (6/19/19)	"
074	7/24/19	074 Cover Letter by A.J. LaRosa re Hearing Exhibits (7/24/19)	Opponent
075	"	075 2016 Emails	"
076	"	076 Email by Chris Tiesler re Costco Proposed Design Changes (10/28/16)	"

No.	Date Received (Office Use Only)	Document Name/Description	Submitted By (Office Use Only)
077	"	077 Environmental Court Assurance of Discontinuance and Order (5/11/09)	"
078	"	078 NRB Mitigation Options Memorandum (12/1/09) and Mitigation Options Report (7/28/09)	"
079	"	079 Email by VTrans re 4C0288-19B Costco Expansion (11/26/08)	"
080	"	080 VTrans Appendix E: Level of Service Policy (5/31/07)	"
081	"	081 VTrans Condemnation Complaint (6/11/19)	"
082	"	082 Cover Letter by Mark Hall re Hearing Exhibits (7/24/19)	Applicant
083	"	083 Sheet C2-02 Overall Site Plan (2/1/18, rev 5/16/18)	"
084	"	084 Sheet C10-02 Intersection Taking Exhibit	"
085	"	085 Sheet C10-02 Intersection Exhibit	"
086	"	086 Costco's Proposed Conditions for Limited Operations	"
087	"	087 Videos of Intersection (1-17)	"
088	7/25/19	088 Cover Letter by Mark Hall re Revised Table 3 (7/25/19)	"
089	8/2/19	089 Cover Letter by A.J. LaRosa re Rebuttal Comments and Argument of R.L. Vallee, Inc.	Opponent
090	"	090 Rebuttal Comments and Argument of R.L.Vallee, Inc. in Response to Costco's July Filings and Pursuant to July 16, 2019 Recess Order (8/2/19)	"
091	8/9/19	091 Cover Letter to R. Lomonaco re Proposed Findings of Fact and Conclusions of Law by Mark Hall, Esq. (8/9/19)	Applicant
092	"	092 Costco Proposed Findings of Fact and Conclusions of Law Dated August 9, 2019	"
093	"	093 Cover Letter to Rachel Lomonaco re R.L. Vallee's Proposed Findings of Fact by A.J. LaRosa (8/9/19)	Opponent
094	"	094 R.L. Vallee's Motion Pursuant to Rule 13 to Recess these Proceedings and Convene Further Hearings and Allow the Submission of Necessary Evidence by J. Anderson and A.J. LaRosa Dated August 9, 2019	"
095	"	095 R.L. Vallee's Proposed Findings of Fact and Conclusions of Law and Order by J. Anderson and A.J. LaRosa Dated August 9, 2019	"
096	8/26/19	096 Cover Letter by Mark Hall re Opposition to R.L. Vallee's Motion (8/26/19)	Applicant
097	"	097 Costco Wholesale Corporation's Opposition to R.L. Vallee's Motion Pursuant to Rule 13 to Recess these Proceedings and Convene Further Hearings and Allow the Submission of Necessary Evidence by Mark Hall (8/26/19)	"
098	9/20/19	098 Vallee Hearing Evidence (10 Tables) (9/20/19)	Opponent
099	2/18/20	099 Letter by Mark Hall re Status Inquiry	Applicant
100		100	
101		101	
102		102	
103		103	
104		104	

CERTIFICATE OF SERVICE

I hereby certify on this 28th day of February 2020, a copy of the foregoing ACT 250 LAND USE PERMIT & FINDINGS OF FACT & CONCLUSIONS OF LAW & ORDER #4C0288-19F, was sent by U.S. mail, postage prepaid to the following individuals without email addresses and by email to the individuals with email addresses listed.

Note: any recipient may change its preferred method of receiving notices and other documents by contacting the District Office staff at the mailing address or email below. If you have elected to receive notices and other documents by email, it is your responsibility to notify our office of any email address changes. All email replies should be sent to NRB.Act250Essex@vermont.gov

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Dated at Essex Junction, Vermont, this 28th day of February, 2020.



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