

VERMONT SUPERIOR COURT  
Environmental Division  
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Burlington, VT 05401  
802-951-1740  
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Docket No. 20-ENV-00011

**In re: Blue Flame Gas Co., Inc. Site Plan & Cond. Use**

**ENTRY REGARDING MOTION**

Title: Motion to Reconsider (Motion #8)

Filer: Mark F. Werle, Attorney for Applicant Blue Flame Gas Co., Inc.

Filed Date: April 20, 2023

Memorandum in Opposition, filed by Peter Raymond, Esq., Attorney for Interested Party Michael Toole, on May 12, 2023.

Memorandum in Opposition, filed by Merrill Bent, Esq., Attorney for Town of Landgrove, on May 12, 2023

**The motion is GRANTED in part, DENIED in part.**

Blue Flame Gas Company, Inc. ("Blue Flame") submitted a site plan and conditional use application to the Town of Landgrove ("Town") Zoning Board of Adjustment ("ZBA") to carry out its business operations, generally including the creation of a facility using an existing building for administrative offices, a service center, and related support facilities for its propane business at 3 Valley View Drive in the Town's Commercial District ("the Project"). Blue Flame appealed a ZBA decision denying Blue Flame's proposed site plan and application for a conditional use permit for the Project to this Court. On March 21, 2023, the Court granted in part and denied in part Blue Flame's motion for summary judgment. See Blue Flame Gas Co. Inc. SP & CU, No. 20-ENV-00011 (Vt. Super. Ct. Envtl. Div. Mar. 21, 2023) (Durkin, J.) (the "Summary Judgment Entry"). Presently before the Court is Blue Flame's motion to reconsider its Summary Judgment Entry. Blue Flame filed its Motion to Reconsider on Apr. 20, 2023.

Blue Flame is represented by Attorney Mark F. Werle. The Town is represented by Attorney Merrill E. Bent. Attorney Peter G. Raymond represents Interested Party Michael Toole (“Adjoining Landowner”).

### **Legal Standard**

The Rules of Civil Procedure, including Rule 59, apply to these post-judgment proceedings in the Environmental Court. V.R.E.C.P. 3. Because these provisions are substantially similar, the Court may use federal cases interpreting the federal rule as persuasive authority. Drumheller v. Drumheller, 2009 VT 23, ¶ 29, 185 Vt. 417; See Reporter’s Notes, Rule 59 (“This rule is substantially similar to Federal Rule 59”).

Motions to reconsider are treated the same as Rule 59 motions to amend or alter a judgment. See, e.g., Rubin v. Sterling Enters., 164 Vt. 582, 588 (1996). There is an “exacting standard” for granting a motion for reconsideration. VTRE Invs., LLC v. Montchilly, Inc., No. 126-7-17 LECV, slip op. at 2–3 (Vt. Super. Oct. 15, 2019) (citing Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) (“[A] motion to reconsider should not be granted [when] the moving party seeks solely to relitigate an issued already decided.”)); Chefs Shoes, Inc. v. Kastner, 710 F. Supp. 2d 436, 454 (D. Vt. 2010) (Rule 59(e) motion should not be granted “where the moving party seeks to relitigate issues already considered thoroughly by the court”), aff’d, 449 F. App’x 37 (Fed. Cir. 2011).

Rule 59(e) provides four primary grounds for relief: (1) “to correct manifest errors of law or fact upon which the judgment is based”; (2) to allow a moving party to “present newly discovered or previously unavailable evidence”; (3) “to prevent manifest injustice”; and (4) to respond to “an intervening change in the controlling law.” See Montanio v. Keurig Green Mountain, Inc., 276 F. Supp. 3d 212, 216 (D. Vt. 2017) (citing 11 C. Wright & A. Miller, et al., Federal Practice and Procedure, Civil § 2810.1 (3d ed.)); see Reporter’s Notes, V.R.C.P. 59 (giving “the court broad power to alter or amend a judgment”). The Vermont Supreme Court has held that the courts “may reconsider issues previously before it, and generally may examine the correctness of the judgment.” Drumheller, 2009 VT 23, ¶ 36 (quoting Ray E. Friedman & Co. v. Jenkins, 824 F.2d

657, 660 (8th Cir.1987)); see also Bell v. Bell, 162 Vt. 192, 195 (1994) (stating that the purpose of a Rule 59(e) motion “is to examine the correctness of matters before the court at trial”).

Reconsideration and amendment are “an ‘extraordinary’ remedy that should be used ‘sparingly.’” In re Bouldin Camp - Noble Road, No. 278-11-06 Vtec, slip op. at 1 (Vt. Env'tl. Ct. Sept. 13, 2007) (Wright, J.) (quoting In re Appeal of Berezniak, No. 171-9-03 Vtec, slip op. at 3 (Vt. Env'tl. Ct. Apr. 6, 2007) (Wright, J.)). The standard in considering these motions “is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” Shrader, 70 F. 3d at 257. “Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a ‘second bite at the apple.’” Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998).

### **Discussion**

Blue Flame moves for reconsideration of the Court’s determinations on five issues that were before the Court on summary judgment: (1) underground storage requirements; (2) safety and traffic; (3) noise; (4) screening; and (5) decisions of law not decided on summary judgment. Adjoining Landowner and the Town oppose the motion to reconsider the Summary Judgment Entry on the issues regarding safety and traffic, noise, screening, and the determination whether the Project is categorically a retail establishment, business office, multi-use building, accessory structure, or some combination thereof, but do not oppose reconsideration of the issue regarding underground storage requirements. The Court discusses each basis for reconsideration in the relevant subparts, below.

#### **I. Underground Storage Requirements**

Blue Flame moves the Court to reconsider its determination that Blue Flame has not demonstrated that the Project conforms with Vermont Underground Storage Tank (“VUST”) standards. In support of its motion to reconsider, Blue Flame directs the Court to page 21 of its Memorandum in Support of Summary Judgment, in which it demonstrated that “[t]he Department of Environmental Conservation Waste Management Division does not regulate

propane storage.” Mot. Summ. J. at 21 (filed Jan. 28, 2022) (citing Underground Storage Tank Rules, § 8-201(f), Vt. Admin. Code 16-3-203:8-201 (WL)). As such, Blue Flame’s V.R.C.P. 59 motion in this respect is predicated on correcting a “manifest error[] of law or fact upon which the judgment is based . . . .” See Montanio, 276 F. Supp. 3d at 216. Neither Adjoining Landowner nor the Town espouse arguments opposing reconsideration on these grounds.

The Court concludes its earlier determination on this issue was based on a mistake of law and fact, and accordingly reconsiders the issue of whether Blue Flame has demonstrated that the Project complies with the specific performance standards within the Town of Landgrove Zoning Bylaws (“Bylaws”). As such, we **GRANT** Blue Flame’s motion to reconsider in this regard and address the merits of the Summary Judgment Entry at issue through its motion.

The specific performance standards regarding fuels storage require that the storage tank “conform to the standards set by the Vermont Department of Labor and Industry Fire Prevention Division<sup>[1]</sup> or the Vermont Department of Environmental Conservation Waste Management Division, as applicable.” Bylaws § 322.1.

The undisputed material facts, as related to this issue, are as follows:

1. The Project has received a permit from the Department of Public Safety’s Division of Fire Safety. Id. at ¶ 45; Ex. 10.

2. The Department of Environmental Conservation Waste Management Division does not regulate liquid propane storage. See Underground Storage Tank Rules, § 8-201(f), Vt. Admin. Code 16-3-203:8-201 (WL) (excluding “[l]iquid petroleum gas storage tanks, used predominantly for the storage of propane, propylene, butane, and butylenes, regulated by the Vermont fire prevention and building code” from the definition of “underground storage tanks”).

As such, the Court concludes that Blue Flame has demonstrated that the storage tanks “conform to the standards set by the [DPS Division of Fire Safety] or the Department of Environmental Conservation Waste Management Division, as applicable.” Bylaws § 322.1. Blue Flame has received the necessary permit from the Department of Public Safety’s Division of Fire

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<sup>1</sup> There is no Fire Prevention Division within the Vermont Department of Labor. The Vermont Department of Public Safety (DPS), however, does have a Division of Fire Safety. It is undisputed that Blue Flame received a permit from DPS’s Division of Fire Safety. Ex. 10.

Safety and is not required to receive an Underground Storage Tank permit from the Department of Environmental Conservation Waste Management Division. Accordingly, the Court **GRANTS** Blue Flame summary judgment on this performance standard.

II. Traffic and Safety

Blue Flame moves the Court to reconsider its determination that Blue Flame has not demonstrated that the Project's parking/loading area is designed to allow for the safe circulation of its trucks and other vehicles. In support of its motion to reconsider, Blue Flame raises two arguments: (1) Blue Flame will know exactly when deliveries will arrive and will be sure that those few vehicle parking spaces are open, so as not to block the delivery trucks from safely circulating to the delivery points in the rear of the site, and (2) Blue Flame's expert report on the project's "Anticipated Site Generated Traffic"<sup>2</sup> estimates that the project will generate only 44 new vehicle trips per day on a public highway that already adequately handles over 4,000 daily vehicle trips,<sup>3</sup> which represents an insignificant increase in traffic on the highway. As such, Blue Flame's V.R.C.P. 59 motion on this issue is predicated upon correcting "manifest errors . . . [of] fact upon which the judgment is based" and includes the presentation of new evidence related thereto. See Montanio, 276 F. Supp. 3d at 216. The Court finds no basis for reconsideration, as discussed in greater detail below.

First, Blue Flame's site plan shows 12 parking spaces on the subject property, but its turning movement plan shows that cars occupying four of those spaces obstruct trucks delivering propane when occupied. Ex. 1. Based on Blue Flame's own plans, therefore, it is certainly disputed that the site configuration will promote the safe circulation of vehicles on site due to this potential blockage. In its original motion for summary judgment, Blue Flame failed to present evidence to the Court demonstrating that it would safely manage its parking by restricting use of those spaces whenever required to ensure safe circulation of delivery vehicles on the subject property. Blue Flame now argues that it will manage parking and deliveries accordingly to ensure

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<sup>2</sup> See Blue Flame's Exhibit 11 at 4–6.

<sup>3</sup> Blue Flame's expert advised that a "vehicle trip" is considered to be either one vehicle entering or one vehicle leaving the site, meaning that a single vehicle that enters and leaves the site is counted as two vehicle trips.

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Blue Flame Gas Co. Inc. SP & CU App., No. 20-ENV-00011 (EO on Blue Flame's Motion to Reconsider) (07-26-2023).

such safe circulation. This is newly provided evidence that does not rise to the “newly discovered evidence” standard for the Court to grant reconsideration.

Newly discovered evidence is that which is “truly newly discovered or . . . could not have been found by due diligence.” United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493 (2d Cir. 1983) (quoting Westerly Elecs. Corp. v. Walter Kidde & Co., 367 F.2d 269, 270 (2d Cir. 1966)). The newly discovered evidence must be facts that existed at the time of the motion for summary judgment, and the moving party must have been excusably ignorant of the facts despite their due diligence. Ryan v. U.S. Lines Co., 303 F.2d 430, 434 (2d Cir. 1962); Campbell v. Am. Foreign S.S. Corp., 116 F.2d 926, 928 (2d Cir. 1941). Failure to show excusable ignorance or due diligence will generally result in the denial of the motion to reconsider. Titcomb v. Norton Co., 307 F.2d 253, 265 (2d Cir. 1962).

Blue Flame’s new evidence offered in support of its reconsideration motion is not newly discovered, but instead is only newly proffered. There was no evidence in the record before the Court on summary judgment that Blue Flame intended or planned to restrict parking in those unsafe spaces or had the ability to control when trucks arrived on site such that it can assure those spaces will not be occupied. Blue Flame carried the burden of proof on summary judgment and Michael Toole and the Town were entitled to the benefit of all reasonable doubts and inferences. Daiello v. Town of Vernon, 2022 VT 32, ¶ 29, 282 A.3d 894. Blue Flame provides no legitimate reason why such a traffic plan was unavailable to it at the time it filed its underlying summary judgment motion. Therefore, it was not a manifest error for the Court to conclude that a dispute of fact exists concerning safe circulation on-site when Blue Flame’s own plans demonstrate that safe circulation is not possible as the Project is presently designed and Blue Flame failed to present a plan to alleviate this concern.

Second, regarding Blue Flame’s request that the Court reconsider its conclusion that Blue Flame’s traffic report reached its conclusions about the safety of the Project based on “current traffic study numbers rather than the projected numbers,” the Court again finds no basis for reconsideration. Blue Flame’s traffic report concludes the Project meets the safety standards because the intersection of Valley View Drive and VT Route 11 “is not considered to be a high crash location” and because speeds of existing cars on the roads do not present a safety issue.

While Blue Flame’s traffic report did provide projected additional trips from the Project and concluded that VT Route 11 has capacity to handle those trips, Blue Flame’s traffic report failed to analyze how those additional vehicle trips turning into and out of Valley View Drive and onto and off of Route 11, with trucks coming up to speed or braking to turn, could be done safely. In other words, the traffic report makes safety projections for the proposed Project based on current traffic conditions but does not analyze how the traffic related to the Project will impact those current conditions.

Again, Blue Flame carried the burden of proof on summary judgment and Adjoining Landowner and the Town were entitled to the benefit of all reasonable doubts and inferences. Daiello, 2022 VT 32, ¶ 29. Giving Adjoining Landowner and the Town the benefit of all reasonable doubts and inferences, the Court concluded that Blue Flame failed to meet its burden and finds no basis for reconsidering its summary judgment determination here. We therefore look forward to a complete presentation of evidence at trial on these topics.

### III. Noise

Blue Flame moves the Court to reconsider its determination that Blue Flame has not demonstrated that the undisputed material facts show that the Project complies with the noise performance standards. We rendered this summary judgment determination because we concluded that the Project presentation failed to account for the noise from trucks starting, accelerating, or braking within its property. In support of V.R.C.P. Rule 59 motion, Blue Flame argues that Blue Flame’s acoustics experts (“RSG”) did consider noise coming from trucks starting or accelerating, but did not provide that data because RSG chose to study the loudest possible sounds that would be generated on site, and that those loudest sounds are those made by a transport truck pumping.<sup>4</sup> Blue Flame now seeks to present the information that was studied by

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<sup>4</sup> Blue Flame argued, in its motion to reconsider, that the:

[T]ruck must be running during this operation as the truck motor is what drives the hydraulic pump, which pumps the propane into the storage tank. While pumping, the truck engine is set above idle, and the noise of the pump combined with the engine above idle, is what was measured in the report.

As far as trucks accelerating at the site, they will be just above idle as there is not space for a truck to accelerate.

Mot. to Reconsider at 3–4.

RSG but not presented in the report or in connection with its motion for summary judgment, as grounds to reconsider the Summary Judgment Entry now. As such, Blue Flame's V.R.C.P. 59 motion on this issue is predicated upon allow a moving party to present new but previously existing evidence. See Montanio, 276 F. Supp. 3d at 216.

Again, to meet the threshold for reconsideration for new evidence, the evidence must be "newly discovered or previously unavailable." Newly discovered evidence is that which is "truly newly discovered or . . . could not have been found by due diligence." Potamkin Cadillac Corp., 697 F.2d at 493.

Here, Blue Flame carried the burden of proof on its motion for summary judgment, but failed to provide the Court with an understanding about why some evidence relevant to this Court's analysis as to the Project's compliance with applicable noise standards was not explicitly addressed in the RSG report. Nowhere in Blue Flame's noise report did it provide the noise level of a truck driving onto or leaving the site, and it did not provide evidence of such noise at comparable sites. While Blue Flame now argues that the sounds it did study and presented in RSG's report encompass those noises, that conclusion is not supported by the language within RSG's sound study. The Court finds no basis for reconsidering that determination based on the evidence that was before the Court on summary judgment. We therefore await a presentation at trial of all relevant and admissible evidence concerning the noise impacts of this proposed project.

#### IV. Screening

Blue Flame moves the Court to reconsider its determination that Blue Flame has not demonstrated that the Project complies with the Bylaws' screening requirements. Specifically, in support of its motion for reconsideration, Blue Flame argues that "Blue Flame has always stressed that it is willing to screen as much as is practicable and had communicated that to the Town at the AMP level. Blue Flame has already put in as many evergreens in as possible, so that when grown it will in essence be a nature hedge/fence." As such, the Court interprets Blue Flame's V.R.C.P. 59 motion on this issue is predicated upon allowing it to "present newly



discovered or previously unavailable evidence” or “to prevent manifest injustice . . . .” See Montanio, 276 F. Supp. 3d at 216.

By its own motion, Blue Flame concedes that it’s not entitled to reconsideration on this issue. Mot. to Reconsider at 4. While the Court agrees with Blue Flame on that notion, it pauses only to point out that Blue Flame’s assertion that it has already planted as many evergreens as possible is not supported by the record before the Court on summary judgment.

To the extent that Blue Flame appears to use this motion to reconsider as an opportunity to suggest that “this is an issue that would be greatly benefitted by the site visit that the Court had previously suggested,” Id., the Court notes that, while Blue Flame would be entitled to such a site visit, site visits are not fact-finding endeavors. The applicable Vermont Rules of Environmental Court Proceedings governing site visits makes clear that the court may conduct a site visit as an aid in reaching an evidentiary decision. V.R.E.C.P. 2(e)(3); see V.R.E. 611(a). The evidentiary effect of any matters observed on a site visit, however, is more limited. See In re Quechee Lakes Corp., 154 Vt. 543, 551–52 (1990) (findings may be grounded on knowledge acquired during site visit so long as observations are not the sole basis for the findings). We have repeatedly stressed that we find site visits helpful, not as an evidentiary tool, but as an opportunity to provide context for the evidence that is presented at trial. We look forward to conducting a site visit with the parties to this appeal prior to our *de novo* hearing.

#### V. Principal Use of Blue Flame’s Proposed Facility

Blue Flame moves the Court to reconsider its determination that the undisputed material facts did not entitle Blue Flame to a determination of which principal use applies to the property. In support of its argument, Blue Flame points to the Court’s finding that the undisputed material facts demonstrate that the Project could be categorized a retail establishment, business office, multi-use building, accessory structure, or some combination thereof, and that Blue Flame is entitled to a determination of this legal issue. While the Court is uncertain on which basis Blue Flame seeks reconsideration, it reads this basis as correcting a “manifest errors of law . . . upon which the judgment is based . . . .” See Montanio, 276 F. Supp. 3d at 216.

The Court concludes that Blue Flame has failed to provide a basis to reconsider the Court's determinations (or lack thereof) regarding the Project's categorization. Indeed, Blue Flame presented facts and arguments in the alternative that supported a conclusion that the Project was a retail establishment, business office, multi-use building, accessory structure, or some combination thereof. As such, the Court decided that the ultimate determination was best left for a decision on the merits, based upon the evidence presented at trial. The Court determined that Blue Flame did not establish sufficient undisputed material facts for the Court to be able to resolve the disputed legal questions, and that Blue Flame would like such a legal question to be determined, provides no basis to reconsider.

That determination is well within the Court's discretion. See e.g., Margison v. Spriggs, 146 Vt. 116, 119 (1985) (discussing that the court has discretion to deny summary judgment even where legal standard has been satisfied). Blue Flame bore the burden of proof on a motion for summary judgment, and failed to demonstrate to this Court that it was entitled to judgment as a matter of law on this issue. The Court finds no basis for reconsidering that decision now. We therefore await a presentation at trial of all relevant and admissible evidence concerning the use criteria of this proposed project.

To the extent that Blue Flame requests further guidance as to the facts needed for the Court to resolve this issue at trial, the Court declines to advise Blue Flame on how to present its case-in-chief. The issues that remain to be determined at a merits hearing are clear from the Court's decision and the applicable zoning provisions. How Blue Flame chooses to make that case is a matter for Blue Flame and its attorneys.

### **Conclusion**

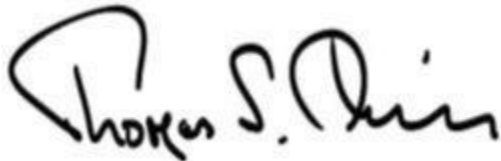
For the forgoing reasons, Blue Flame's motion to reconsider is **GRANTED in part, and DENIED in part**. To the extent that Blue Flame has identified a mistake of law or fact regarding the Court's determination of whether Blue Flame demonstrated compliance with Bylaws § 322.1, the Court **GRANTS** reconsideration. On all other issues, reconsideration is **DENIED**.

Upon reconsidering the specific performance standard for fuel tank storage, the Court concludes that Blue Flame has demonstrated that the storage tanks "conform to the standards set by the [DPS Division of Fire Safety] or the Department of Environmental Conservation Waste

Management Division, as applicable.” Bylaws § 322.1. Blue Flame has received the necessary permit from the Department of Public Safety’s Division of Fire Safety and is not required to receive an Underground Storage Tank permit from the Department of Environmental Conservation Waste Management Division. Accordingly, the Court **GRANTS** Blue Flame summary judgment on this performance standard.

The Court Operations Manager shall set this matter for a pretrial status conference, so that the Court may discuss with the parties the actions needed to prepare and set this matter for trial.

Electronically signed at Brattleboro, Vermont on Wednesday, July 26, 2023, pursuant to V.R.E.F. 9(d).

A handwritten signature in black ink that reads "Thomas S. Durkin". The signature is written in a cursive style with a large initial 'T' and 'D'.

Thomas S. Durkin, Superior Judge  
Superior Court, Environmental Division