

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Industrial Tower and Wireless, LLC	)	
for a certificate of public good, pursuant to	)	Case No. 26-0574-PET
30 V.S.A. § 248a, authorizing the installation	)	
of wireless telecommunications facilities off	)	
Bordoville Road in Enosburgh, Vermont	)	

PETITIONER'S OPPOSITION TO INTERVENORS' MOTION TO DISMISS

NOW COMES Petitioner Industrial Tower and Wireless, LLC (“ITW”), by and through its counsel, MSK Attorneys, and submits this memorandum of law in opposition to the July 24, 2026 motion to dismiss filed by intervenors Chris and Sandra Bruhn (the “Bruhns”). The Bruhns ask the Public Utility Commission (the “Commission”) to hold that because this Commission once denied a Certificate of Public Good (“CPG”) for a 140-foot lattice tower on the grounds that the Northwest Regional Planning Commission (the “NRPC”) found said tower did not conform to the regional plan, ITW may never again seek approval of a shorter, materially different telecommunications facility with a new application. Critically, the new 120’ tower that is the subject of the present petition has affirmative support from the Town of Enosburgh and the NRPC, which now affirms that the project *conforms with the regional plan*. This reverses the single ground upon which the 140’ tower was denied, where the Commission itself identified a 120' tower may be acceptable and invited a future application; and the Commission and hearing officer *refused* to take any evidence on or consider a 120' tower in the prior proceeding.

Given the facts and the law, the Bruhns’ request has no merit. Holding that such a record bars a re-application that corrects the flaws of a prior application is not the law of preclusion, nor the law of land-use in Vermont. The Bruhns’ motion should be denied.

II. FACTUAL BACKGROUND

On June 6, 2022, ITW petitioned under 30 V.S.A. § 248a for a certificate of public good authorizing the construction of a wireless telecommunications facility off Bordoville Road in Enosburgh, and the Commission assigned it Case No. 22-2120-PET. *Order Denying CPG* at 1–2 (Aug. 3, 2023) (attached as Exh. 1). The facility ITW proposed was a **140-foot**¹ above-ground-level self-supporting lattice tower carrying six whip antennas reaching 153 feet. *Id.*, Finding 3, at 4. The tower was designed with additional vertical capacity for up to five future collocating carriers, at 122.5', 112.5', 102.5', 92.5', and 82.5' AGL. *ITW v. Roisman*, No. 2:23-cv-00365-gwc, Op. & Order at 13 (D. Vt. Aug. 19, 2024) (attached as Exh. 2). In the prior proceeding, the NRPC recommended that the Commission find the Project *did not* comply with the Regional Plan—because, in the NRPC's view, the tower's unused collocation capacity made it “taller than it needs to be” and therefore inconsistent with the Plan's “least obtrusive” policy. *Order Denying CPG* at 6. Because that adverse recommendation was “presumed correct, valid, and reasonable,” the case turned on whether ITW had shown “good cause” to override it. The Commission held it had not:

[B]ecause these goals could, at least in part, be achieved with a lower tower height, I do not find this sufficient good cause to reject the NRPC's recommendation in support of a less obtrusive facility. Accordingly, I recommend that the Project application be denied on the grounds that it is not consistent with the Regional Plan, with substantial deference accorded to the recommendation of the NRPC pursuant to § 248a(c)(2).

Order Denying CPG at 7.

The Commission emphasized that this ground was the *sole* and dispositive basis for denial, and it expressly declined to reach any other § 248a criterion, including aesthetics and orderly

¹ In the Bruhn's motion, they misstate the record. The motion asserts that a 120-foot height “is precisely that which ITW strenuously represented could not work in the prior proceeding.” Mot. at 6. Mr. Delaney did not say that. At the January 12, 2023 hearing, Mr. Delaney testified, “I did say that 120 would work for us,” Tr. of 1/12/23 Evid. Hr'g at 32 (attached as Exh. 3); *see id.* at 33, 36 (he also added ITW “would rather have the coverage at 120 at least”; a 120-foot tower is “structurally capable of holding one less cell carrier”).

development: “Because I recommend finding that the Project fails to comply with 30 V.S.A. § 248a(c)(2), and because that recommendation, if accepted by the Commission, is dispositive, I have not made recommendations addressing the other Section 248a criteria.” *Id.* at 7 & n.8. The entire prior denial thus rests on a single fact: the then-adverse NRPC recommendation, presumed valid, that ITW could not overcome.

Far from foreclosing a 120' tower and subsequent application, the Commission held that the State's telecommunications interests “could, at least in part, be served with a shorter and less obtrusive tower as recommended by the NRPC,” and pointedly observed: “[h]ad the tower been proposed with less height devoted to future collocation space, the recommendation of the NRPC may have been different.” Order Denying CPG at 8–9. After the evidence closed, the Department of Public Service had recommended developing evidence on a reduction “from 140' to 120'.” *Id.* at 6. The Commission declined to take that evidence for one reason only—because a 120-foot tower was not the project before it—and invited a future application:

Regarding the Department's recommendation to collect additional evidence on lowering the Project tower height, I find this to be inappropriate at this point in the proceedings given that *the Petitioner is not seeking a CPG for a 120-foot tower*. However, I encourage the Department to explore this issue with the Petitioner, *should the Petitioner decide to submit an application consistent with the Regional Plan in the future*.

Order Denying CPG at 7 (emphasis added). This Commission thus identified a 120-foot tower as the potentially compliant, less-obtrusive alternative and *expressly refused to adjudicate it*, consider it, discuss it, or evaluate it in the prior case. Rather, the merits of a 120-foot tower were reserved “for the future” and a subsequent application. This is that future and subsequent application; this is the very thing the Commission invited.

ITW did not appeal the August 2023 denial under 30 V.S.A. §§ 12 and 234 to the Vermont Supreme Court. *ITW v. Roisman*, Op. & Order at 24. It instead pursued its distinct federal remedy under 47 U.S.C. § 332(c)(7)(B)(v), suing the members of the Commission and raising three federal

claims: that the denial lacked substantial evidence, that it had the effect of prohibiting service, and that § 248a(c)(2) is preempted. *Id.* at 24, 34–35. The District Court granted the Commissioners summary judgment (Aug. 19, 2024), and the Second Circuit affirmed (Oct. 27, 2025). Both courts decided only whether the denial of the *140-foot* tower violated federal law, recognizing that the Telecommunications Act “does not affect or encroach upon the substantive standards to be applied under established principles of state and local law.” Op. & Order at 26 (citation omitted). Both stressed the denial “did not prohibit construction of a telecommunications tower altogether” and “expressly contemplates that ITW could submit an application for a *120-foot structure*.” *Id.* at 34; Summary Order at 3 (attached as Exh. 4). The Bruhns and the Commission did not challenge or appeal this determination.

The Second Circuit likewise noted that the Commission “did not prohibit construction of a telecommunications tower altogether,” but rather concluded that a less intrusive option remained available, and that a 120-foot tower “would likely attract at least one national carrier.” Summary Order at 3, 5 n.4. It too left open the door for a future application doing just that – filing for the less intrusive means. Again, neither the Bruhns nor the Commission challenged this conclusion.

As was specifically invited, contemplated, and left open by the Commission and Federal Courts, ITW has now come forward with a new application for a revised tower in line with what the Commission advised could work. In this docket, Case No. 26-0574-PET, ITW petitions for the *120-foot* tower that the Commission, the Department, and both federal courts identified as the less-obtrusive, Regional-Plan-compliant alternative to the denied 140-foot facility. The redesign does exactly what the prior denial demanded: it eliminates the speculative future-collocation capacity that made the 140-foot tower “taller than it needs to be,” reducing the tower's collocation positions from the five future-carrier mounts depicted in the prior design to two. Exh. 2 at Page 13

(describing the prior design's five collocation positions). Notably, ITW's new application was promptly filed. The Second Circuit issued its decision on October 27, 2025, and ITW filed the pending petition on March 27, 2026.

On the new, shorter tower, the NRPC now recommends approval. On April 30, 2026, the NRPC filed a formal comment in this docket stating that it “has reviewed the Section 248a application . . . for a *120-foot* telecommunications tower” and “has found that the project constitutes a substantial regional impact and that *the project conforms with the Northwest Regional Plan.*” NRPC Public Comment (Apr. 30, 2026) (emphasis added). The recommendation that was adverse in 22-2120-PET is now favorable. (Apparently the change from the previous 140' to the now 120' was significant enough to flip the basis for denial to a recommendation for approval.) Further, given the serious public safety concerns, on April 27, 2026, the Enosburgh Selectboard wrote to the Commission “to express our support for the proposed communication tower,” explaining that the Town's fire, ambulance, and highway departments “rely on radio communication” and “often experience challenges with the lack of adequate coverage,” that “[a]uthorities and emergency services have voiced concerns about the lack of communication and dead zones in that area *during recent tragic events in our community,*” and that the tower “will make significant improvements, strengthening communication and coordination for first responders.” Town of Enosburgh Selectboard Letter (Apr. 27, 2026). The Selectboard “strongly encourage[d]” approval. *Id.*

III. LEGAL STANDARD

Intervenors the Bruhns argue that the current application is effectively barred by both issue and claim preclusion. These are related but not co-equal doctrines. The Vermont Supreme Court explains them as follows:

The doctrine of res judicata, also called claim preclusion, “bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the ‘parties, subject matter and causes of action are identical or substantially identical.’ ” *Berlin Convalescent Ctr. v. Stoneman*, 159 Vt. 53, 56, 615 A.2d 141, 143 (1992) (quoting *Berisha v. Hardy*, 144 Vt. 136, 138, 474 A.2d 90, 91 (1984)). The doctrine does not require that the claims were actually litigated in the prior proceeding; rather, it applies to claims that were or should have been litigated in the prior proceeding. *See Lamb v. Geovjian*, 165 Vt. 375, 380, 683 A.2d 731, 734–35 (1996).

For example, res judicata applies to both affirmative defenses that could have been raised before, *see id.* at 381, 683 A.2d at 735, and compulsory counterclaims that should have been raised before, but not to permissive counterclaims. *See Cold Springs Farm Dev., Inc. v. Ball*, 163 Vt. 466, 473, 661 A.2d 89, 93 (1995).

In re Tariff Filing of Cent. Vermont Pub. Serv. Corp., 172 Vt. 14, 20, 769 A.2d 668, 673–74 (2001); *see also New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (“Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim.”). Just because one request may be similar to a prior, if they are not identical, claim preclusion does not apply. *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 41, 769 A.2d 668, 688 (2001)(holding that a decision in one rate case, while concerning the same facility, concerns, issues and legal challenges was not barred by res judicata because “the claims in the later rate case are not identical to those in the earlier rate case simply because the cases involve different periods for which the rates will be in effect.”).

Further, for claim preclusion to apply against a party, that party must have had the opportunity to “fully litigate the claim they now raise.” *In re St. Mary's Church Cell Tower*, 2006 VT 103, ¶ 8, 180 Vt. 638, 639–40, 910 A.2d 925, 928 (2006). *Nat. Res. Bd. Land Use Panel v. Dorr*, 2015 VT 1, ¶ 10, 198 Vt. 226, 231, 113 A.3d 400, 403 (2015)(asserting that in administrative proceedings, for claim preclusion to apply, the parties had to have an “adequate opportunity to litigate” the issue); *See generally* 18 J. Moore, et al., *Moore's Federal Practice* §

132.02 [2][d], at 132–25 to 132–26 (2009) (“A party may be precluded from relitigating an issue if evidence supporting the party's position on the issue could have been submitted in previous litigation but, for whatever reason, was not properly raised.”). The doctrine does not apply when there are factual differences between a prior proceeding and a current proceeding as that defeats the requirement of “identity.” See *Am. Trucking Ass'ns v. Conway*, 152 Vt. 363, 371, 566 A.2d 1323, 1328 (1989) (holding that res judicata does not apply where evidence in two cases is “sufficiently different” such that claims are not “identical for claim preclusion purposes”). For this reason in *In re Chelsea Solar LLC*, 2021 VT 27, 214 Vt. 526, 535, 254 A.3d 156, 163 (2021) this Commission and the Court found that issue preclusion did not bar a finding that a solar facility was one single plant as opposed to two plants because changes were made in the facilities between the prior proceeding and instant proceeding.

“The doctrine of collateral estoppel, also called issue preclusion, is similar in effect but more narrow in scope.” See *Berlin Convalescent Ctr.*, 159 Vt. at 56, 615 A.2d at 144. Again, as explained in *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*:

It bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case. See *id.* The elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair. See *State v. Dann*, 167 Vt. 119, 126, 702 A.2d 105, 110 (1997).

The purposes of both claim preclusion and issue preclusion are: (1) to conserve the resources of courts and litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudication. See *Berlin Convalescent Ctr.*, 159 Vt. at 57, 60, 615 A.2d at 144–46; Ball, 163 Vt. at 473, 661 A.2d at 94.

In re Tariff Filing of Cent. Vermont Pub. Serv. Corp., 172 Vt. 14, 20, 769 A.2d 668, 673–74 (2001).

In administrative proceedings “res judicata does not apply...as an inflexible rule of law.” *In re Carrier*, 155 Vt. 152, 157–58, 582 A.2d 110, 113 (1990) (citation omitted). As concerns land-use, of which this proceeding inherently is, the preclusion doctrines of res judicata and collateral estoppel are revised to permit successive applications that correct or revise the failings of a prior application. Under the so-called “successive-application” doctrine, the general rule is that a zoning board or planning commission may not entertain a second application concerning the same property after a previous application has been considered “unless a substantial change of conditions ha[s] occurred or other considerations materially affecting the merits of the request have intervened between the first and second application.” *In re McGrew*, 2009 VT 44, ¶ 10, 186 Vt. 37, 42, 974 A.2d 619, 623 (2009) *citing Carrier* at 158, 582 A.2d at 113 (quotation omitted). One change in conditions sufficient to allow for consideration of a successive application is “when the application has been substantially changed so as to respond to objections raised in the original application or when the applicant is willing to comply with conditions the commission or court is empowered to impose.” *In re Jolley Assocs.*, 2006 VT 132, ¶ 12, 181 Vt. 190, 195–96, 915 A.2d 282, 287 (2006). Under this doctrine, an applicant may be relieved from a previous application denial upon a showing that a successive application “addresses all concerns that prevented approval of the prior application.” *In re Dunkin Donuts S.P. Approval (Montpelier)*, 2008 VT 139, ¶ 8, 185 Vt. 583, 585, 969 A.2d 683, 685–86 (2008) *citing In re Armitage*, 2006 VT 113, ¶ 4, 181 Vt. 241, 917 A.2d 437.

IV. ARGUMENT

A. Neither issue nor claim preclusion applies, because whether a 120-foot tower satisfies § 248a was never litigated or decided—the Commission reserved it for a future application.

Claim preclusion bars re-trying a claim “identical or substantially identical” to one litigated, or one that “should have” been litigated, in the prior proceeding; issue preclusion requires

that the issue actually “was litigated” to finality. *In re Tariff Filing*, 172 Vt. at 20, 769 A.2d at 673–74; *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265, 583 A.2d 583, 587 (1990); accord *In re M.V.*, 2022 VT 31, ¶ 26, 216 Vt. 491, 282 A.3d 941. Neither is present here.

Whether a 120-foot tower satisfies § 248a was not litigated in the prior proceeding. That docket decided a single question—whether the 140-foot tower conformed to the Regional Plan. The prior case denied the petition on that ground alone, leaving every other § 248a criterion expressly undecided. Order Denying CPG at 7 & n.8. The single, outcome-determinative fact was the content of the NRPC’s recommendation as to a 140-foot tower; whether a 120-foot tower satisfies the NRPC, or any other criterion, was never reached. Nor was it even applied for. There can thus be no issue preclusion on a question never decided, and no claim preclusion on a “claim”—the request for a 140-foot tower—that was not tried, litigated, or otherwise considered and is a materially different facility now proposed.²

Nor “should” or “could” the 120-foot question have been raised in the prior case. That was the Commission’s own determination in plain language. The Commission’s jurisdiction runs to the application before it. In Case No. 22-2120-PET, that was a 140’ tower and when asked or invited to consider a 120’ it declined to take any evidence on a shorter tower, and it reserved the merits of a 120-foot tower to a subsequent application, which it invited. Order Denying CPG at 7.

That two towers are *similar* or on the same parcel does not make them the same issue or claim. See *In re Tariff Filing*, 172 Vt. at 34, 769 A.2d at 688–89. In fact, the distinction is the very one the Commission drew when it set the 120-foot tower aside as a separate, future matter.

² The Bruhns’ observation that ITW’s witnesses “testified about this proposed tower height in the first proceeding,” Mot. at 11, proves nothing. The testimony was on cross examination and testimony that touched on a 120-foot alternative in a case adjudicating a 140-foot proposal is not an adjudication of a 120-foot application—particularly where the Hearing Officer expressly refused to take evidence on or consider the merits of a 120’ tower.

Penalizing ITW for accepting that invitation would also contradict *Apple Hill*, where the Commission denied a petition, the developer refiled a redesigned project at the agency’s suggestion, and the Supreme Court held preclusion did *not* bar the new petition—both because there had been no “full and fair opportunity” and because the “interests in protecting judicial economy and finality of judgments are particularly slight” when a party proceeds at the agency’s own invitation. 2019 VT 64, ¶¶ 22–23. The Bruhns quote the Commission’s invitation, Mot. at 2–3, 8, then argue that accepting it is forbidden.

The Bruhns also argue that the prior application could have or should have been amended and thus preclusion attaches. This fails as there is no mandatory duty to amend. Amendments, if anything, are like permissive counterclaims as there is no rule that required ITW to amend. The Commission’s procedures contain only a *permissive* amendment provision, exercisable “before the evidentiary record is closed” and subject to Commission approval. Rule 2.204(G). Thus they are not precluded. Moreover, there was no opportunity to amend. The evidentiary record in 22-2120-PET closed after the January 12, 2023 hearing—before the NRPC’s dispositive height objection and the Department’s 120-foot suggestion were even filed—so the amendment window had closed as a matter of rule by the time ITW was on notice of the problem, which is precisely why the Hearing Officer found taking 120-foot evidence “inappropriate at this point in the proceedings.” Order Denying CPG at 7. Under the analogous compulsory/permissive counterclaim framework, a step that was never compulsory cannot support preclusion. The Bruhns fault ITW for not doing something the rules no longer permitted, never required, and the Commission was not entertaining.

Similarly, the idea that these two permits are the same transaction for preclusion purposes is flawed. The Bruhns' argument in this regard rests entirely on *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, 178 Vt. 51, 869 A.2d 103, and the Restatement's “same transaction” test. Mot.

at 9–11. Faulkner was an ordinary civil action between private litigants and its holding is vastly overstated by the Bruhns. In Faulkner, the plaintiff brought a claim in 1994 for head injuries suffered when a metal panel struck her head after falling off an amusement ride. *Id.* at ¶2. In 2000 she was diagnosed with epilepsy and it was determined to be related to the prior head injury. She brought a second claim which the Court summarized as “pursuing the identical case she pursued in 1994 except that she is alleging that the injury to her head was more serious.” *Id.* at ¶7. The Court found, after this framing, that this claim was barred by claim preclusion. In so articulating the Court explained that claim preclusion may exist when the same evidence supports both actions. *Id.* citing *Am. Trucking Ass'ns v. Conway*, 152 Vt. 363, 370, 566 A.2d 1323, 1328 (1989) (“This Court has previously characterized causes of action as the same for purposes of claim preclusion where ‘the same evidence will support the action in both instances.’ ”).

Here, in this petition, that is obviously not the case. An exhibit showing a 120’ tower does not support a 140’ tower and vice versa. Nor does the NRPC and Town recommendation for approval in this case support the prior case, nor does the NRPC’s recommendation in the prior case support the Bruhns now. It is simply impossible to conclude with logical reasoning that one permit application correcting the defects in another is “a transaction” which is viewed as “an act [that] causes a number of harms to, or invades a number of different interests of the same person.” *Id.* citing Restatement Second of Judgments §24 cmt. c.

B. The sole ground of the prior denial has been reversed, and the resulting new facts defeat the “same issue” and “full and fair opportunity” elements.

The prior case’s sole issue was whether ITW had good cause to overcome the NRPC’s adverse recommendation that a 140-foot tower failed the Regional Plan. That is no longer the issue. The NRPC’s April 30, 2026 comment finds that the 120-foot project “conforms with the Northwest Regional Plan,” and by statute that recommendation is now “presumed correct, valid, and

reasonable.” 30 V.S.A. § 248a(b)(5)³. The consequence is significant. Where the presumption once ran *against* ITW—which bore, and lost, the good-cause burden—it now runs *for* ITW, and it is the *Bruhns* who must show, with evidence, that deferring to the NRPC’s favorable recommendation “would create a substantial shortcoming detrimental to the public good or the State’s interests in section 202c.” § 248a(b)(3).

These changes are new facts, and new facts defeat preclusion. In *Echeverria*, the Court held issue preclusion did not bar a second action where, although “[t]he general issue . . . is the same, . . . the relevant facts are not identical,” and the “new facts . . . were not available at the time” of the first proceeding, so the party “did not have a full and fair opportunity to litigate the issue.” 2024 VT 47, ¶ 14. Simply, an “issue” (or claim) whose controlling fact has been reversed is not the “same issue.” See *In re M.V.*, 2022 VT 31, ¶ 37; *Echeverria*, 2024 VT 47, ¶ 14.

The NRPC’s reversal and the Town’s endorsement are quintessential new facts: they postdate the denial, they could not have been raised then—indeed the Commission barred any evidence on a 120-foot tower—and they go to the exact issue on which the denial turned. To treat a changed application built on facts that did not exist in 2023 as precluded would convert preclusion into a “one shot, one time, forever” rule. It is not. Nor are the legal issues the same. This reversal disposes of the Bruhns’ assertion that “[t]he legal and evidentiary standards are the same between the first petition and the present petition,” Mot. at 7: the statutory presumption that decided the first petition now runs in the opposite direction. The case is now about the Bruhns’ good cause to overcome the recommendations of the Town and NRPC for approval - not ITW’s good cause to overcome denial.⁴

³ The Town’s endorsement is a second such change and also carries with it a tremendous burden shift whereby the legal standard is now whether the Bruhns can show good cause to overcome.

⁴ The Bruhn’s also raise a minimally addressed “estoppel” or Judicial estoppel claim. Judicial estoppel requires, among other things, that the party *succeeded* in persuading the earlier tribunal to adopt its position. See *New*

The Bruhns are also incorrect that there is any preclusive effect from federal court appeals. The federal courts decided only questions of federal law—whether the denial of the *140-foot* tower lacked substantial evidence, prohibited service, or rested on a preempted statute—under 47 U.S.C. § 332(c)(7). They did not decide whether a *120-foot* tower advances the general good of the State under § 248a, and the Telecommunications Act “does not affect or encroach upon” that state-law inquiry. Op. & Order at 26. Both courts treated a 120-foot tower as a distinct future matter. *Id.* at 33–34; Summary Order at 3. A judgment that the 140-foot denial did not violate federal law is not a judgment that a 120-foot tower fails Vermont’s public-good standard.

C. This is a land-use matter, and the successive-application doctrine permits a revised petition that cures the sole defect of the prior denial.

A certificate of public good under § 248a is, at its core, a land-use proceeding. It authorizes a physical structure to be built on a specific parcel subject to findings on aesthetics, the natural environment, orderly development, public health and safety, and the public good. It is the functional equivalent of a municipal zoning permit or an Act 250 permit—indeed, obtaining a § 248a CPG is an elective alternative to permitting the same project under Title 24 and Title 10. As set out in the Legal Standard above, Vermont does not apply *res judicata* and collateral estoppel as rigid, mechanical bars in the land-use setting; it applies the successive-application doctrine. Under this doctrine, a second application concerning the same property is permitted where it “has been substantially changed so as to respond to objections raised in the original application” or where “other considerations materially affecting the merits . . . have intervened between the first and second application.” *Carrier*, 155 Vt. at 158, 582 A.2d at 113; *accord In re Application of*

Hampshire v. Maine, 532 U.S. 742, 749–51 (2001). ITW did not prevail below; it lost, on its contention that the 140-foot tower should be approved. A party that accepts an adverse ruling and conforms its conduct to it is not “estopped” by the arguments the tribunal rejected.

Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 58, 199 Vt. 19, 121 A.3d 630. That burden “is satisfied when a revised proposal addresses all concerns that prevented approval of the prior application.” *Carrier*, 155 Vt. at 158–59, 582 A.2d at 113–14; *accord In re Armitage*, 2006 VT 113, ¶¶ 4, 9, 181 Vt. 241, 917 A.2d 437.⁵ While this Commission has never expressly stated that it follows the successive-application doctrine, there is no principled basis to subject a telecommunications siting permit to a harsher, more mechanical preclusion rule than the zoning permit next door or the Act 250 permit down the road—particularly when a telecommunications applicant could obtain the doctrine’s benefit simply by permitting the same tower through those tribunals instead. To hold otherwise would render Vermont’s land-use law internally incoherent.

As applied here, ITW satisfies that doctrine. The prior petition was denied for one reason only—the tower’s excess height, devoted to speculative future collocation, rendered it nonconformant with the Regional Plan under § 248a(c)(2). ITW’s revised petition addresses that concern in full: it reduces the tower by twenty feet, to the very 120-foot height the Commission and the Department identified as possibly compliant, and it eliminates the speculative collocation positions that drew the objection, reducing the collocation mounts from five to two such that the NRPC now approves.

Moreover, under the doctrine “it is not determinative that the applicant could have or should have made the new proposal at the time of the original permit review.” *Id.* An applicant is “free to file a successive application” without first satisfying the standards for reopening a judgment, and reconsideration is not the “sole remedy” after a denial. *In re Dunkin Donuts S.P. Approval (Montpelier)*, 2008 VT 139, ¶¶ 8, 13, 185 Vt. 583, 969 A.2d 683; *In re JLD Properties of St. Albans, LLC*, 2011 VT 87, ¶ 15, 190 Vt. 259, 30 A.3d 641. That is this Commission’s own

⁵ In the Act 250 context this is adjudicated under Act 250 Rule 34 which bars “relitigation.” *In re Application of Lathrop Ltd. P'ship I*, 2015 VT 49. This standard reflects the same relaxed preclusion rules in the land-use context.

practice: in the *Apple Hill* sequence it encouraged the denied applicant to refile in a new docket for a redesigned project, and the Supreme Court refused to give the prior denial preclusive effect. 2019 VT 64, ¶¶ 8, 23. Consistent application of law results in a determination that ITW’s project is not precluded.⁶

WHEREFORE, Petitioner Industrial Tower and Wireless, LLC respectfully requests that the Commission deny the Bruhns' motion to dismiss and in so doing award ITW their costs and fees including attorneys’ fees incurred with responding to their motion.

Dated at Burlington, Vermont, this the 7th day of August, 2026.

Respectfully submitted,

INDUSTRIAL TOWER AND WIRELESS, LLC

By: /s/ Alexander LaRosa, Esq.

A.J. LaRosa, Esq.

MSK Attorneys

275 College Street, P.O. Box 4485

Burlington, VT 05406-4485

(802) 861-7000 ext. 1270

Counsel for Petitioner

⁶ To the extent the Bruhns would argue the change is cosmetic that argument fails. The prior denial turned on unjustified height serving speculative collocation, and the District Court upheld it on precisely that reasoning—a “less intrusive option” existed because the extra height served only speculative future carriers. Op. & Order at 33–34; Summary Order at 3. This application eliminates that and the conclusive proof of the materiality of the change is the NRPC and Town’s new positions.