UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

COSTCO WHOLESALE CORPORATION,

Plaintiff,

DECISION AND ORDER

15-CV-6657L

v.

ANTHONY J. COSTELLO & SON DEVELOPMENT, LLC, et al.,

Defendants.

INTRODUCTION

This action arises out of a commercial real estate lease relating to a retail development in Rochester, New York. Plaintiff Costco Wholesale Corp. ("Costco") has sued Anthony J. Costello & Son Dev., LLC and Anthony J. Costello & Son (Spencer) Dev. LLC (collectively, "Costello defendants" or "Costello"), and GAP Partners IV, LLC, d/b/a City Gate Wine and Spirits ("GAP"), alleging claims for breach of contract and declaratory relief. Costco's claims stem from GAP's operation of a wine and liquor store in a retail development on a parcel of land in Rochester, New York that is the subject of the lease in question. Jurisdiction is premised on diversity of citizenship under 28 U.S.C. § 1332.

The Costello defendants have answered the complaint, and asserted a counterclaim seeking a declaratory judgment that Costello and GAP are not prohibited from locating the GAP Store in its present location. GAP has also answered the complaint, and filed counterclaims for breach of contract, intentional interference with prospective economic advantage, malicious interference with contract rights, and promissory estoppel.

Costco has filed a motion for judgment on the pleadings (Dkt #21). The Costello defendants have cross-moved for judgment on the pleadings (Dkt. #33). GAP has responded to Costco's motion.

BACKGROUND

The following facts are taken from the pleadings, including documents that are attached to, incorporated by reference in, or integral to the pleadings. The Court may consider such documents in deciding a motion for judgment on the pleadings. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

Costco is a corporation incorporated in the State of Washington, with a principal place of business in Washington. The Costello defendants are Nevada corporations with a principal place of business in Rochester. GAP is a New York limited liability company, with a principal place of business in Rochester. Complaint ¶¶ 1-3.

Costco's claims relate to a mixed-use real estate project in Rochester known as CityGate ("CityGate" or "Project"). Costello is the developer of the Project, and owns certain parcels of

property at CityGate. Costco also owns a parcel at CityGate ("Costco Parcel"), where it operates what it describes as a "membership warehouse club" ("Costco Store"). Complaint ¶ 9.

On August 29, 2014, Costco and the Costello defendants entered into a "Reciprocal Easement Agreement" ("REA"). In the REA, the parties recited that each of them sought to construct certain improvements at CityGate, and they "recognize[d] that for the optimum development and operation of the Project it is necessary that they agree to certain matters, including, but not limited to, matters relating to the construction and maintenance of facilities on, and the use and restrictions on the use of, their respective Parcels ... ." Dkt. #1-2 at 8.

One of those restrictions is set forth at § 5.1(n) of the REA. That clause prohibits, anywhere on the Project,

> any wholesale or retail establishment the primary business of which is the sale of wine, beer, spirits or other alcoholic beverages intended for off premises consumption, (i) except on the Costco Parcel and the Southern Property and (ii) except for in the Building designated as Building 'F' on the Site Plan which shall in no event exceed twelve thousand (12,000) square feet ... .

In effect, then, § 5.1(n) provides that a liquor store could only be opened on the parcel owned by Costco, or on the areas designated as "the Southern Property" (which is currently undeveloped) and Building F. The locations of those parcels are shown in a site plan attached to the REA. *See* Dkt. #1-2 at 53.

On or about September 30, 2014, Costello entered into a lease with GAP, pursuant to which GAP has opened a liquor store, CityGate Wine and Spirits" ("GAP Store"), at CityGate. The GAP Store is in Building D, which is not among the sites listed in the REA as a permissible location for a liquor store. The location of the GAP Store in Building D is central to the present dispute.

According to Costello, when Costco and Costello entered into the REA, Costello anticipated leasing space for a liquor store somewhere in CityGate. Costello contends that in the REA, it designated Building F as a permissible location for that store because Building F was one of the few buildings that had been constructed at CityGate. Costello Answer (Dkt. #13) ¶ 22. Costello alleges that other buildings (including Building D) were shown on the site plan, but there was no guarantee that they would ever be built, or when they would be built. Costello contends that the selection of Building F in the REA was therefore "mere happenstance." *Id.*

Costello further states that when it entered into the lease with GAP, the lease "incorrect[ly]" gave the address for the GAP Store as 400 East Henrietta Road, which was (and apparently remains) a vacant lot, designated as the site of Building E on the site plan. *Id.* ¶ 23. On March 5, 2015, Costello and GAP entered into a second amendment to the lease (it is not clear when they entered into the first amendment, or what it consisted of), which referenced three addresses: Building D, Building E and Building F. Costello states that "[t]o clear up various difficulties and confusion, it is the intent of both Costello and GAP" that the GAP Store shall be located at Building D. That is the location of the GAP Store today.

With respect to Building F, Costello states that "[f]or reasons beyond the control of Costello and GAP," that building is currently occupied by another tenant, Siemens Corporation. *Id.* ¶ 27. What those reasons are is unclear, but it is apparent that Building F is, as a practical matter, currently unavailable as a location for the GAP Store. None of the parties dispute that Building F is now occupied by Siemens, which precludes GAP from relocating there.

According to GAP, it applied to the New York State Liquor Authority ("SLA") for a liquor license on or about December 30, 2014. GAP states that the application was approved on or about

February 7, 2015. GAP's Answer (Dkt. #11) at 11. It is not apparent when the GAP Store actually opened for business, but there is no dispute that it is currently up and running, presumably after considerable effort and expense on GAP's part.[1] Costco does not allege, and there is no indication in the pleadings, that Costco filed any objections to GAP's license application, either with the SLA, or with Costello, GAP, or their lawyers, prior to the commencement of this lawsuit.

Costco also wanted to open a wine or liquor store on its own parcel. Operating through a related company, CHM Liquors, Inc. ("CHM"), Costco filed an application with the SLA for a license to operate a liquor store in a separate building on the Costco Parcel, adjacent to the Costco Store.[2]

GAP initially opposed CHM's liquor license application, although the parties eventually reached some accommodation in that regard. The Costello defendants have submitted a copy of a "Liquor License Agreement" ("LLA"), dated July 13, 2015, pursuant to which GAP would agree to withdraw its "letter dated June 25, 2015 filed with the SLA" (which presumably was filed in opposition to CHM's application), and to support CHM's liquor license application. Costello's Answer (Dkt. #13-2) at 2.[3] For their part, Costco and CHM agreed that they would not oppose any application by GAP to operate a liquor store in Buildings D or F, provided that any such store would not exceed 11,000 square feet. Dkt. #33-3 at 2-3. The LLA was, however, "conditioned upon CHM

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[1]The SLA's website indicates that GAP's application was filed on December 31, 2014, and that the "effective date" of the license is November 25, 2015. *See* https://www.tran.sla.ny.gov/JSP/query/PublicQueryNameSearchPage.jsp (search term "CityGate").

[2]The SLA's website indicates that CHM's application was filed on April 13, 2015. *See* https://www.tran.sla.ny.gov/JSP/query/PublicQueryNameSearchPage.jsp (search term "CHM").

[3]The June 25 letter does not appear to be in the record.

obtaining a final, non-appealable liquor license issued by the SLA; otherwise this Agreement shall be null and void." *Id.* at 3 ¶ 8.

The copy of the LLA submitted by Costello contains signature lines for the principals of Costo, CHM, GAP and Costello, but is signed only by Anthony Costello, on behalf of Costello. Dkt. #13-2 at 4. The Costello defendants' counsel states that Costco, Costello, and CHM entered into the LLA, *see* Pezzulo Decl. (Dkt. #33-1) ¶ 17, but Costello's answer states that "[a]pparently GAP did not sign" the LLA, Dkt. #13 ¶ 28. Costco, however, has stated that Costco, the Costello defendants, and GAP all entered into the LLA, although Costco says that it has no knowledge of whether Burke, on behalf of GAP, ever actually signed the written agreement. Dkt. #19 ¶ 6.[4]

Costello's attorney states that "[p]ursuant to the terms of the Liquor License Agreement, Costello supported Costco/CHM in its application for a liquor license." Pezzulo Decl. ¶ 19. Costello has submitted a copy of a letter from Costello to the SLA supporting CHM's application. That letter states, "We are writing to you to let you know that we support CHM's application for a liquor license as well as GAP Partners' application." Dkt. #33-4. Curiously, the letter is dated April 7, 2015, over three months prior to the date of the LLA. But it is clear that Costello did express its support for CHM's application.

On July 14, 2015, a hearing was held before the SLA on CHM's application. Burke attended the hearing, and GAP alleges that he initially intended to speak in opposition to CHM's application. Prior to the hearing, however, Burke spoke with the attorney for CHM and Costco, Keven Danow.

[4]On a motion for judgment on the pleadings, the Court cannot consider an attorney's affidavit or declaration, to the extent that it asserts matters outside the pleadings. *See*, *e.g.*, *Cashman v. CHS, Inc.*, No. CIV 13-3002, 2013 WL 2458621, at *4 (D.S.D. June 6, 2013). Since Costco's answer to GAP's Counterclaim admits that all the parties entered into the LLA, however, the Court can assume that the LLA was entered into at least by the Costello defendants and Costco.

Danow allegedly told Burke that if Burke would speak in support of CHM's application, Costco and CHM would drop any opposition to the location of the GAP Store in Building D. GAP's Answer (Dkt. #11) ¶ 7. According to GAP's account of this exchange, that oral agreement was not conditioned on CHM's application being approved. GAP alleges that Burke agreed, and that he did voice his support at the hearing for CHM's application. *Id.* ¶¶ 8, 9.

In its answer to GAP's counterclaims, Costco admits that Burke spoke at the hearing, but denies that there was any oral agreement between him and Danow. Dkt. #19 ¶ 7. As for the substance of Burke's statements, Costco states in its answer that Burke's "remarks were recorded and posted on the State Liquor Authority website." Dkt. #19 ¶ 7. The Court has located, and watched, a video recording of the hearing on the SLA website.[5]

That recording shows that Danow spoke first, while Burke and Danow's client (who would operate the prospective CHM liquor store) stood nearby. Danow handed the SLA panel a copy of a letter from Burke withdrawing his opposition to CHM's application.

Costello has submitted to the Court a copy of that letter. Dkt. #13-3.[6] Costello states that the letter was drafted by counsel for CHM, though on its face it is from Burke, on behalf of GAP. The letter, which is addressed to the SLA, states that GAP had,

> [t]hrough counsel ... filed a letter with the SLA dated June 25, 2015 protesting [CHM's liquor license] application. We hereby withdraw that letter and protest. After further consideration, we believe that the public advantage and convenience will in fact be served by two stores in this shopping center. Given the different offerings of each proposed facility,

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[5] The video is available at http://abc-state-ny.granicus.com/MediaPlayer.php?view_id=2&clip_id=900.

[6] While the copy of the letter that Costello has submitted is undated and unsigned, at the hearing Danow described the document as "a letter from Mr. Burke," and Burke apparently agreed.

> we believe that there is room for both stores to grow and prosper and we support CHM's application.

Dkt. #13-3.

After reading Burke's letter, the hearing officer asked Danow, "How did you get them [*i.e.*, GAP] to say that they don't oppose this?" Another member of the Board is heard saying, "What's going on?," implying that she, too, wondered what had led to this sudden and unexpected rapprochement between GAP and Costco/CHM.

Burke then spoke, briefly. He acknowledged that GAP "had submitted some opposition" (which the hearing officer, interjecting, characterized as "very vehement opposition ... life and death") to CHM's application, but, Burke added, when he submitted that opposition, he was "not really aware of [Costco's and CHM's] model."[7] Once he learned that CHM's business model was very different from GAP's, he decided to withdraw his opposition.

In his own remarks, Danow never indicated that Costco or CHM had any objections to GAP's store, or its location. He focused instead on the expected growth of retail and residential development in the CityGate area, and the differences between the GAP and CHM stores. Danow's remarks need not be recited in detail here, but the gist of his remarks was that the two stores would serve different clienteles and would be entirely compatible with each other. No mention was made by anyone of any agreement between GAP and Costco or CHM, but Danow did state, "All is forgiven" between those entities.

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[7]The hearing officer added later that Burke's prior submission (which had apparently been prepared by GAP's prior counsel) opposing CHM's application had made "some excellent points" regarding why the public convenience and advantage would not be served by granting the application.

The dialog continued for several more minutes, but at the end of the hearing, the SLA denied CHM's application. The hearing officer stated that it would not serve the "public convenience and advantage" to have two large liquor stores (of 11,000 and 4500 square feet) that close to each other, in the same retail development.[8]

The hearing officer acknowledged Burke's letter withdrawing his opposition to CHM's application, but stated, "it doesn't change the fact that they're right across the parking lot" from each other. The officer stated that the distance between the two stores was not necessarily dispositive, but that "distance is a factor," and that to have two such large stores that close to each other "doesn't say that public convenience and advantage [would be] served" by issuing CHM's application. The hearing officer also noted that "there are other [liquor] stores there as well" in the area around CityGate. He found that the area was "saturated."

Costco filed the complaint in this action on October 28, 2015. The first cause of action "seeks a declaration that the Lease [between Costello and GAP] violates the REA and that the Lease must be declared null and void," and "a declaration that any operation of CityGate Wine and Spirits outside what is authorized by the REA violates the REA." Dkt. #1 ¶¶ 27, 28. The second cause of action, for breach of contract, alleges that "Costco is entitled to injunctive relief enjoining [Costello] and GAP from proceeding with the Lease or operating CityGate Wine and Spirits outside the location permitted by the REA." *Id.* ¶ 35. Costco also seeks "damages to the extent they are established following determination of the other claims ... ." *Id.* at 6.

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[8]That finding reflects the SLA's legislative directive "to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages." N.Y. ABCL § 2.

In its answer, GAP has asserted a counterclaim for breach of contract, based on the alleged oral contract between Burke and Costco/CHM (acting through their attorney, Danow). GAP has also asserted counterclaims sounding in intentional interference with prospective economic advantage, malicious interference with contract rights, and promissory estoppel, all generally based on the same alleged oral agreement between Burke and Danow.

The Costello defendants have asserted one counterclaim, seeking a declaration that "Costello and GAP are not prevented from locating the GAP Liquor Store in Building D ... ." Dkt. #13 at 8. The Costello defendants base that counterclaim on § 1951 of the New York Real Property Actions and Proceeding Law ("RPAPL"), which permits a court to set aside a restriction on the use of land that "is of no actual and substantial benefit to the persons seeking its enforcement ... ."

The relevant issues have been thoroughly briefed and argued. What has been little addressed is the proverbial "elephant in the room." That idiomatic expression could well characterize what seems to be apparent from the most dispassionate, objective reading of the pleadings in this case: that Costco, in essence, seeks to force GAP to close its liquor store and leave CityGate altogether, in a not-so-subtle attempt to have a better chance to obtain a liquor license for itself.

DISCUSSION

In deciding a motion for judgment on the pleadings under Rule 12(c), courts apply the same standard as that applicable to a motion under Rule 12(b)(6). Under that test, a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-moving party. *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). Accordingly, judgment

on the pleadings is appropriate only if, drawing all reasonable inferences in favor of the non-moving party, it is apparent from the pleadings that no material issues of fact need to be resolved and that the moving party is entitled to judgment as a matter of law.

When evaluating a Rule 12(c) motion, a court may consider the pleadings and exhibits attached thereto, and statements or documents incorporated by reference in the pleadings. *Withrow v. Donnelly*, 333 F.Supp.2d 108, 110 (W.D.N.Y. 2004) (citing *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)). The court may also take judicial notice of documents that are available on a government website. *See Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, No. 14 Civ. 9783, 127 F.Supp.3d 156, 165-67 (S.D.N.Y. 2015) ("When considering a Rule 12(b)(6) or Rule 12(c) motion, the Court may take judicial notice of certain matters of public record without converting the motion into one for summary judgment [including] ... documents filed with governmental entities and available on their official websites").

Applying those standards here, I conclude that defendants are entitled to judgment, and that the complaint must be dismissed, for a number of reasons.

First, while Costco denies GAP's allegation that there was an oral agreement between GAP and Costco/CHM, entered into before the SLA hearing, it is clear that Burke, despite what the hearing examiner had characterized as his previous "life and death" opposition to CHM's application, did an about-face amd supported that application at the hearing. To think that he simply had a change of heart, and that there was no tit-for-tat between GAP and Costco/CHM, hardly seems

plausible. Danow's statement, "All is forgiven" likewise suggested that some agreement had been reached.[9]

Even if Burke's withdrawal of his opposition at the July 14 hearing was done pursuant to the July 13 LLA, which was contingent on CHM's license application being approved, that agreement illustrates a fundamental flaw in Costco's claims in this action. Costco's claims rest on the premise that Costco has been *harmed* by the GAP Store's location in a site, Building D, that is not permitted under the REA. But the only harm identified by Costco is the SLA's denial of CHM's application for a liquor license. The LLA itself demonstrates that Costco was primarily concerned not with any contractual violation, *per se*, but with whether Costco or CHM would be permitted to open a liquor store at CityGate. The record of the SLA hearing on CHM's application also shows that the SLA would have reached the same decision, regardless of whether the GAP Store was in Building D or Building F.

There is no indication from the pleadings or any of the related documents that Costco ever raised any formal objections to GAP's SLA application, or to GAP's plans to open a liquor store at CityGate, until after Costco's own plans to open a liquor store there were foiled by the SLA's denial of CHM's application. That denial clearly had nothing to do with the particular building at CityGate in which the GAP Store was located. It was simply the fact that the proposed CHM store would be "right across the parking lot" from the GAP Store that was the focus of the SLA's concern. Nothing

[9]Danow said this partially in response to a question to Burke from one of the hearing officers, referencing GAP's prior written opposition to CHM's application, and asking, "So Mr. Danow isn't the big falsehood teller that [your prior attorney] says he is?" Stammering, Burke replied, "some things were said," when Danow stepped to the microphone and stated, "All is forgiven." But that remark nonetheless reinforces the suggestion that the parties had reached some agreement resolving their objections to their respective stores.

in the record indicates that it would have made one iota of difference to the SLA, had the GAP Store been located in Building F, rather than in Building D. If anything, that would seemingly have only hurt CHM's chances even further, since Building F is *closer* to the proposed CHM store than is Building D. It is hard to see how the hearing officer's expressed concerns about the proximity of the two stores would have been allayed by the GAP Store's presence in Building F.[10]

Costco also argues that defendants' reliance on the alleged oral contract between GAP and Costco/CHM is misplaced because even assuming that such an agreement was made, the REA by its terms prohibits oral modifications. *See* Dkt. #1-2 at 41 § 11.8.

The problem with that argument is that any agreement, oral or otherwise, between Costco/CHM and GAP would not, and could not, modify the REA. The alleged agreement would be a separate, discrete contract between Costco/CHM and GAP, which was not a party to the REA. In essence, the contract, as alleged by GAP, was simply to the effect that Costco would not seek to enforce its rights under the REA, if Burke supported CHM's application. That would not "modify" the REA in any way. *See Northbound Group, Inc. v. Norvax, Inc.*, 5 F.Supp.3d 956, 974 (N.D.Ill. 2013) (non-party cannot modify a contract between existing parties); *Bing Ting Ren v. Wells Fargo Bank, N.A.*, No. 13-0272, 2013 WL 2468368, at *4 (N.D. Cal. June 7, 2013) (oral promise separate from any contractual provision was not a modification to written contract).

In support of their motion, the Costello defendants also rely on New York Real Property Actions and Proceeding Law ("RPAPL") § 1951. "Pursuant to RPAPL 1951(1), a restrictive covenant shall not be enforced if, at the time enforceability of the restriction is brought into question,

[10]It is evident from the site map that Building F is closer than Building D to the Costco Store. Costco does not appear to dispute Costello's assertion that Buildings D and F are 572 feet and 417 feet, respetively, from Costco, and that Building D is 195 feet away from Building F.

it appears that 'the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.'" *New York City Economic Dev. Corp. v. T.C. Foods Import & Export Co., Inc.*, 19 A.D.3d 568, 569 (2005) (quoting RPAPL § 1951(1)).

"[A] plaintiff seeking a declaration that a restrictive covenant is unenforceable must allege that, upon a balancing of the equities, the restrictive covenant is of no actual and substantial benefit to the party seeking to enforce it." *Neri's Land Imp., LLC v. J.J. Cassone Bakery, Inc.*, 65 A.D.3d 1312, 1314 (2d Dep't 2009). *See also New York City Economic Dev. Corp. v. T.C. Foods Import & Export Co., Inc.*, 19 A.D.3d 568, 569 (2d Dep't 2005) ("The party claiming that a restriction is unenforceable bears the burden of proving it").

At the same time, though, courts have held that "a restrictive covenant must be strictly construed against those seeking to enforce it, and may not be given an interpretation extending beyond the clear meaning of its terms." *Kemp v. Village of Scarsdale*, 71 A.D.3d 956, 956 (2d Dep't 2010). "[T]he issue is not whether [the party seeking the enforcement of the restriction] obtains *any* benefit from the existence of the restriction but whether in a balancing of equities it can be said to be, in the wording of the statute, 'of no actual and *substantial benefit.*'" *Chambers v. Old Stone Hill Road Associates*, 1 N.Y.3d 424, 434 (2004) (quoting *Orange & Rockland Util. v. Philwold Estates*, 52 N.Y.2d 253, 266 (1981)) (brackets and emphases in original).

The reasons why the parties agreed to limit the permissible locations of liquor stores at CityGate are not apparent from the record, but the harm that Costco alleges, as a result of the

violation of the REA, is clear: the SLA's denial of CHM's application for a liquor license. The record shows, however, that the SLA's denial was in no way related to the alleged violation of the REA.

Costco has argued that, assuming the SLA would only approve one license for a liquor store at CityGate, "[t]he award of the liquor license to GAP to operate at the unauthorized location [*i.e.*, Building D] prevented CHM from obtaining its license, ... and that had direct impact on Costco." Costco's Reply Mem. (Dkt. #37) at 6. That argument might be persuasive, if the GAP Store's location in Building D, as opposed to Building F, had some bearing on the SLA's decision. But it obviously did not. The presence of the GAP Store at CityGate clearly was a major factor in the SLA's decision, but the alleged violation of the REA was not. In fact, it does not appear that the SLA was even aware of any controversy between the parties concerning the particular building in which the GAP Store was located.

It is clear that the SLA would only grant one liquor license for CityGate, particularly for stores as large as those contemplated by GAP and Costco/CHM. As stated, the examiner found that the area was "saturated," and that the public convenience and advantage would not be served by allowing another liquor store to open in the same development. He was obviously unpersuaded by Danow's and Burke's statements about the different business models of the GAP and CHM stores. There is simply no reason to think that the SLA would have reached a different conclusion, had GAP opened a liquor store in Building F, instead of in Building D.

The hearing examiner repeatedly mentioned that the GAP and CHM stores would be "right across the parking lot" from each other. Whether the GAP Store was in Building D or Building F is irrelevant to those concerns. Building F is closer to the proposed CHM store than is Building D,

and would share the same parking lot. If GAP had opened a liquor store in Building F, it would still have been "right across the parking lot" from the proposed CHM store. Costco's assertion that "[t]he award of the liquor license to GAP to operate at the unauthorized location prevented CHM from obtaining its license" is thus misdirected. The SLA's award of a liquor license to GAP may have prevented CHM from obtaining a license, but the fact that the GAP Store is in a location not permitted by the REA is completely irrelevant to that matter.

Certainly the facts of this case do not fit the classic pattern of cases involving RPAPL § 1951. The general purpose of that statute is to provide a means to get rid of "outmoded restrictions" on the use of land, particularly restrictions that, due to changed conditions, would "prohibit virtually any use whatever ... ." *Philwold Estates*, 52 N.Y.2d at 265. In *Philwold Estates*, for example, which involved a parcel of land in the City of New York, the covenant at issue restricted the parcel's use to the development of a hydroelectric plant. The Court of Appeals held that the covenant was properly extinguished, based on the city's condemnation of all of the property owner's riparian rights, which essentially rendered the land totally useless, in light of the restrictive covenant. Similarly, in *Zimmerman v. Seven Corners Development, Inc.*, 237 A.D.2d 892 (4th Dep't 1997), a covenant created in 1942 provided that only single-family homes could be built on the subject property, but in 1986, the town amended its zoning ordinance to reclassify the property as commercial, and prohibited residential construction on the property. *Id.* at 893.

The restriction at issue here, if enforced, would not render the property valueless, or impossible to use. Section 1951 is broadly worded, however. It provides that a restrictive covenant may not be enforced if it appears that the restriction is of no actual and substantial benefit "either because the purpose of the restriction has already been accomplished or, by reason of changed

conditions or other cause, its purpose is not capable of accomplishment, *or for any other reason*."

In the case at bar, it is difficult to see how the restriction at issue can be said to be of "actual and substantial benefit" to Costco. Costco agreed in the REA that a liquor store could be located in Building F.[11] Had that occurred, it is evident that the SLA would still have denied CHM's application for a liquor license. Since there is no direct causal link between the harm alleged by Costco and the alleged violation of the REA, there is no basis for finding that the restrictive covenant conferred any substantial benefit on Costco.[12]

In short, it is apparent that Costco knowingly agreed to permit the development of a liquor store at CityGate, even closer to its own store than is Building D, the current site of the GAP Store. In doing so, Costco ran the risk that this would adversely affect its own chances of obtaining a liquor license. When Costco learned that GAP was opening a store in Building D, Costco was amenable to that, as long as the SLA approved CHM's application. Costello and Burke agreed to support that application, and they did so; it is difficult to see what more they could have done in that regard. The SLA denied the application, for reasons that had nothing to do with any violation of the REA.

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[11] A liquor store was also permitted on the Southern Property at the site. As stated, that parcel was and remains undeveloped, but that is a further indication that Costco was not particularly concerned about the presence of another liquor store at CityGate, as long as the other store did not interfere with its own liquor license application.

[12] I recognize that as a practical matter, were the Court to grant Costco the relief that it seeks, GAP might have little choice but to leave CityGate altogether, since Building F is now occupied by Siemens. That might open the way for Costco or CHM to reapply for a liquor license, with better prospects for success. That possibility is the "elephant in the room" alluded to above. But that would simply be a fortuitous, collateral result of enforcing the restriction. The fact remains that the REA, on its face, expressly permitted Costello to rent out space for a liquor store at CityGate, *closer* than Building D to the proposed CHM store.

I conclude, therefore, that Costco's motion for judgment on the pleadings must be denied, and that the Costello defendants' motion should be granted.

CONCLUSION

The motion for judgment on the pleadings (Dkt. #21) filed by plaintiff Costco Wholesale Corporation is denied.

The cross-motion for judgment on the pleadings (Dkt. #33) filed by defendants Anthony J. Costello & Son (Spencer) Development, LLC, and Anthony J. Costello & Son Development, LLC ("Costello defendants") is granted, and the complaint is dismissed.

The Court hereby declares, as a matter of law, that any provision in the written contract between plaintiff and the Costello defendants, purporting to prohibit the Costello defendants' lease of the subject premises to defendant GAP Partners IV, LLC, is unenforceable.

IT IS SO ORDERED.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
September 7, 2016.