ENTRY ORDER

2007 VT 76

SUPREME COURT DOCKET NO. 2006-283

MAY TERM, 2007

In re Appeal of Nowicki Building Permit and Appeal of Nowicki NOV Appeal	} } } } } } }	APPEALED FROM: Environmental Court DOCKET NOS. 77-4-05 Vtec & 220-10-05 Vtec Trial Judge: Thomas S. Durkin

In the above-entitled cause, the Clerk will enter:

¶ 1. Appellant Nowicki appeals the decision of the Environmental Court that two adjoining lots have merged for purposes of development under Vermont's new zoning statute. 24 V.S.A. § 4412(2) (effective July 1, 2004). This is the third appeal by Nowicki over the same issue, albeit newly wrapped in the statutory amendments to Chapter 117 of Title 24. See In re Richards, 174 Vt. 416, 819 A.2d 676 (2002) [hereinafter Richards I] and In re Richards, 2005 VT 23, 178 Vt. 478, 872 A.2d 315 (mem.) [hereinafter Richards II]. The facts of the case, which have not changed, are set forth in the reported decisions cited above and will not be extensively repeated here. Suffice it to say that appellant's problem is that he built a house without a permit on a nonconforming lot. Appellate decisions went against him and he now seeks to overturn, in effect, those decisions by recreating two lots—lots that we have held were merged in 1967 when they came into common ownership, and that became nonconforming for further development in 1981 when the Town of Norwich adopted a bylaw increasing the minimum lot size, long before appellant purchased the property. Because nothing in the new statute permits appellant to overcome this history, the Norwich Zoning Board denied relief. The Environmental Court, likewise, denied relief on the same ground—that the amended statute does not apply. We affirm.

¶ 2. Appellant's principal contention on appeal, and an issue that disposes of the case, is that the recent changes to Chapter 117 of Title 24 permitted the Town of Norwich to issue a zoning permit, after-the-fact, for appellant's single-family house. He contends that the law no longer mandates merger, but allows towns to adopt bylaws that apply less restrictive standards to the development of existing small lots than we held were allowed by the previous state statute. See Richards I, 174 Vt. at 424-25, 819 A.2d at 682-83. As a result, appellant claims that the new law has "unmerged" his two lots. As the issue is a legal one, we review it de novo on appeal. State v. Valyou, 2006 VT 105, ¶ 4, ___ Vt. ___, 910 A.2d 922 (mem.). Appellant urges us to apply the plain language of the statute, and therefore we turn to the statute.

¶ 3. Section 4412 is entitled, "[r]equired provisions and prohibited effects," and states in relevant part:

> Notwithstanding any existing bylaw, the following land development provisions shall apply in every municipality:
>
> . . . .
>
> (2) Existing small lots. Any lot that is legally subdivided, is in individual and separate and nonaffiliated ownership from surrounding properties, and is in existence on the date of enactment of any bylaw, including an interim bylaw, may be developed for the purposes permitted . . . even though the small lot no longer conforms to minimum lot size requirements of the new bylaw.
>
> . . . .
>
> (B) The bylaw may provide that if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the nonconforming lot shall be deemed merged with the contiguous lot. However, a nonconforming lot shall not be deemed merged and may be separately conveyed if all of the following apply: [specified conditions omitted]
>
> . . . .
>
> (C) Nothing in this subdivision (2) shall be construed to prohibit a bylaw that is less restrictive of development of existing small lots.

24 V.S.A. § 4412 (emphasis added).

¶ 4. Appellant claims that subsection (C) revived his right to qualify under Section 8 of the Norwich zoning regulations, which operated to grandfather preexisting uses, with certain restrictions, when zoning bylaws changed. Appellant contends that his parcel presently meets the restrictions of Section 8, which is still part of the bylaws, and therefore he is entitled to start over with a new application for a permit for the house he has already built.

¶ 5. As the Environmental Court held, none of the language in the new statute is of assistance to appellant because he cannot meet the definition of "existing small lot." Existing small lots were defined by the Legislature in both the old statute, 24 V.S.A. § 4406(a) (repealed by 2003, No. 115 (Adj. Sess.), § 119(c)), and the new statute, cited above, as ones that existed in a conforming manner, prior to the applicable bylaw or its revision, in individual and separate and nonaffiliated ownership from surrounding properties. Only small lots existing on the date of any new, more permissive bylaws are eligible for consideration under the new statute. The lots appellant seeks to recreate were unaffected by the passage of § 4412(2) because the merged lots were not in "individual, separate, and nonaffiliated ownership" on the effective date of the statute authorizing towns to adopt less restrictive zoning. As we held in Richards I, the two parcels have been merged since 1967 by operation of law, and could not be further developed as of the 1981 minimum-lot-size amendments. 174 Vt. at 420-21, 819 A.2d at 679-80. The language of § 4412(2) is plain and it is mandatory.

¶ 6. We have a long line of precedent applying the definition of "existing small lot," and the definition was left unchanged by the Legislature when it adopted revisions to Chapter 117. The Legislature is presumed to have been familiar with our construction and to have adopted it as part of the new law because it did not enact a different definition. Russell v. Lund, 114 Vt. 16, 22, 39 A.2d 337, 341 (1944). Although appellant argues that this construction of the statute does not effectuate the Legislature's intent, nothing in the revised Chapter 117 indicates that the Legislature intended to nullify well-established principles of zoning law that nonconforming uses are to be phased out, and only those uses that preexist zoning will be grandfathered. See Drumheller v. Shelburne Zoning Bd. of Adjustment, 155 Vt. 524, 529, 586 A.2d 1150, 1152 (1990). On the contrary, the statute is intended to look forward, not backward, and not to undo any acts done prior to its effective date of July 1, 2004. See 24 V.S.A. §§ 4480, 4481. The consequences are the same, therefore, as in Richards I—the zoning regulations prohibit more than one residential use per lot and a permit may not be issued.

¶ 7. In view of our disposition, it is not necessary to reach appellant's theoretical questions relating to construction of the new statute and the status of Norwich's zoning bylaws, which raise legal questions that are not before us because appellant cannot meet the basic terms of the new statute. Finally, we reject appellant's takings claim, which was not timely raised below so that the Environmental Court could take evidence or rule on it, and it therefore has no factual basis. Moreover, it has no legal basis. It is appellant's knowing and deliberate failure to comply with zoning regulations in the first place that has resulted in the loss he now characterizes as a "taking." We know of no constitutional takings doctrine that would compensate appellant under those circumstances.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

❑ Publish

❑ Do Not Publish

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Marilyn S. Skoglund, Associate Justice

_____
Mark J. Keller, District Judge, Specially Assigned

_____
Ernest W. Gibson, III, Associate Justice (Ret.),
Specially Assigned