

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-364

MAY TERM, 2007

In re Appeal of Patricia Baker and Yvonne Johns and In re Chipman Hill Estates PUD	} } } } } } }	APPEALED FROM:  Environmental Court  DOCKET NOS. 200-10-04 Vtec & 39-2-06 Vtec
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In the above-entitled cause, the Clerk will enter:

Neighbors of an existing planned-unit development (PUD) appeal the Environmental Court's decision allowing an amendment to the PUD to designate an access way and future house lot within the PUD. We affirm.

The PUD in controversy is owned by appellee Co-operative Insurance Company. It includes two buildings housing Co-op's headquarters, a parking lot, and four lots designated as open space. The PUD was created in 1968, and its current boundaries were established in a 1979 order that designated the open spaces and required any further development to be subject to planning commission review. In subsequent years, the Middlebury Planning Commission approved a number of amendments to the PUD, including expansions of the buildings and parking lot. The instant controversy began when Co-op applied for a two-lot subdivision of property it owned adjoining the PUD lands. Because one of the subdivided lots would not have road frontage, Co-op proposed that an easement be designated across the PUD to allow access to that lot. The planning commission approved the application, but neighbors appealed, and the Environmental Court ruled that the planning commission should not have approved the application without first providing notice that an amendment to the PUD was also under consideration. The Court stayed the proceedings to allow Co-op to submit another application to the planning commission.

Co-op's revised application, which is the subject of this appeal, proposed that the PUD be amended in two ways: (1) removing development restrictions on one of the open space lots so that it could be designated as a future house lot; and (2) designating an easement through another one of the open space lots to allow access to the adjoining subdivided lot without road frontage. The planning commission approved Co-op's application, subject to several specified conditions, including that any future development comply with all zoning and subdivision regulations. Neighbors appealed, and the Environmental Court consolidated the two pending appeals. Following

a merits hearing, the Court approved both the subdivision permit and the PUD amendment, while imposing substantially the same conditions as those imposed by the planning commission. Neighbors appeal, arguing that (1) the Court should have denied the PUD amendment because it did not comply with express provisions of the Middlebury Zoning Ordinance; and (2) the Court erred in refusing to admit neighbors' proffered evidence of Co-op's future development plans concerning the proposed access way and the subdivided lots.

Neighbors first argue that the Environmental Court should have rejected Co-op's PUD amendment because it did not comply with mandatory requirements of the zoning ordinance, specifically that the PUD application include a dedication of open space and comprehensive master plan and that the application be submitted to the Design Advisory Committee for recommendations to the planning commission. The Environmental Court rejected this argument, noting that some of the ordinance's requirements were applicable only to original PUD applications, and ruling that applications for amendments to existing PUDs need comply only with relevant provisions of the ordinance. The Court found this to have been the practice with respect to prior amendment applications, and concluded that it should be followed here. The Court opined that the permit review process would come to a grinding halt if all amendment applications were required to satisfy every single provision of the PUD section in the ordinance, irrespective of applicability. The Court concluded that the present amendment complied with the town plan, did not materially interfere with the privacy of the residents or neighbors, did not reduce the open space below fifteen percent of the property, did not effect the efficient and unified treatment of development possibilities within the PUD, and did not adversely impact the affected area or the neighborhood.

In making its ruling, the Court noted the limited nature of the proposed amendment—designating an access way and future home lot—and emphasized that the nature or extent of any future use or development of the access way or house lot would have to be reviewed in subsequent proceedings. The Court explicitly stated that any construction related to the amendment could not occur without prior approval of the planning commission. Moreover, one of the conditions of the PUD amendment imposed by the Court was that any future development of the access way, house lot, or adjoining subdivided lots would have to comply with all zoning and subdivision regulations in effect at the time of the future development or application.

We conclude that the Environmental Court's construction of the zoning ordinance was not "clearly erroneous, arbitrary or capricious." In re Casella Waste Management Inc., 2003 VT 49, ¶ 6, 175 Vt. 335. One of the provisions of the zoning ordinance cited by neighbors states that the planning commission "shall not approve an application as a PUD unless it finds that the PUD will result in the dedication of open or public space consistent with the purposes of this Section." Town of Middlebury Zoning Ordinance (effective May 3, 1995) Section 550, III(d). Another provision requires that "[t]he project shall be an efficient and unified treatment of the development possibilities of the site, and shall incorporate the [specified] design requirements," as set forth in a master plan. Id. III(e). A third provision states, in relevant part, that the "final PUD plans shall be referred to the Design Advisory Committee for recommendations to the Planning Commission." Id. III(f)(1).

The above language suggests that these provisions are aimed primarily at original PUD applications or major renovations to existing PUDs, and, as the Environmental Court concluded, they

are not necessarily relevant to the instant application seeking a limited amendment to an existing PUD. In this case, several lots on the subject property were designated as open space when the PUD was created years ago, and the Court found that the open space remaining after the designations in the present amendment would still exceed fifteen percent of the property, in conformity with current law. Middlebury's town planner of twenty-four years testified that, in his opinion, open space dedication was not required when no development was being proposed, but that even if it was, the open space unaffected by the proposed amendment met the requirements of the zoning ordinance. Similarly, requiring a comprehensive master plan and review by a design committee makes sense in the context of an application for a PUD development, but not necessarily in the context of a limited amendment to an existing PUD involving primarily the designation of an access way through the PUD. To the extent a plan was required, Co-op submitted a proposed amendment along with a map displaying the proposal, which the town planner deemed sufficient under the town plan. The Environmental Court concurred that, for the purposes of the limited proposed amendment, Co-op's application satisfied the requirement that a plan be submitted.

According to neighbors, however, the following provision included in the PUD section of the zoning ordinance demonstrates that any PUD amendment must satisfy every aspect of the PUD zoning requirements as if it were an original PUD application:

Approved PUDs shall continue to be administered and implemented according to the conditions and plans under which originally approved, but extensions, enlargements or revision thereof not contemplated in the orders of approval creating them shall be subject to this ordinance. Any substantial change to a PUD shall require a public hearing and approval by the Planning Commission.

In relevant part, this provision states only that any revisions not contemplated in the original PUD approval are subject to the zoning ordinance. The provision does not suggest that every amendment must comport with every aspect of the PUD requirements, irrespective of the relevance of the requirements to the proposed amendment. We conclude that the Environmental Court did not err or act arbitrarily in ruling that Co-op's application for a PUD amendment needed to satisfy only the relevant requirements of the PUD section in the zoning ordinance, and that the planning commission could restrict its review to those requirements that are relevant to the application.\* We also concur with the Court's determination the application satisfied the ordinance's relevant requirements.

Neighbors also argue that the Environmental Court erred in refusing to allow them to present evidence concerning Co-op's plans to develop one of the subdivided adjoining lots. The Court ruled that speculative evidence of future development plans concerning the subdivided lots was irrelevant

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\* In their principle brief, neighbors argue briefly in a footnote that the subject property is a non-conforming PUD because it has no innovative design or no master plan and thus should not be allowed to change or extend its use without meeting the requirements in the zoning ordinance for non-conforming uses. This issue was not raised in neighbors' statement of questions submitted to the Environmental Court, and the Court found no evidence of preexisting nonconforming uses. We conclude that, on this point, neighbors have failed to demonstrate error on the part of the Court.

to the pending application, which did not seek to develop the subdivided lots or the PUD lands. See In re Taft Corners Assocs., 171 Vt. 135, 141 (2000) (“[S]ubdivision review is not intended to police prospective uses of the subdivided lots” and a developer is not “required to specify what uses will be placed on the subdivided lots”). The Court noted that neighbors would be afforded a full opportunity to challenge any future development if and when an application to develop the PUD lands or adjoining property was submitted. The Court emphasized this point by explicitly stating that any future development of PUD lands or the adjoining subdivided lots would be subject to further review and would have to comply with all zoning and subdivision regulations in effect at the time of the proposed development.

Neighbors acknowledge that subdivision review does not require specifying future uses, but contend that future development plans were relevant and necessary with respect to Co-op’s proposed amendment because the zoning ordinance required a master plan that, among other things, described the “uses planned for each area.” We disagree. The purpose of the proposed access way was manifest—to designate an access way to allow subdivision of the adjoining parcel of land. As the Court pointed out, the PUD amendment sought only the designation of the access way, and any future development or use of the access way would have to be reviewed by the planning commission and comply with all zoning and subdivision regulations. The Court did not err in denying neighbors’ request to submit evidence regarding Co-op’s future use of the subdivided property.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice