STATE OF VERMONT

ENVIRONMENTAL COURT

In re: Appeal of Gary and Suzanne Gregoire	}	
	}	
	}	Docket No. 47-3-98 Vtec
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	}	

DECISION and ORDER

Gary and Suzanne Gregoire appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Colchester upholding the Zoning Administrator's determination that two cottages owned as condominiums had lost their pre-existing non-conforming status through abandonment. Appellants are represented by Brian P. Hehir, Esq.; the Town is represented by Richard C. Whittlesey, Esq.

It is undisputed that Appellants own two of the six cottage condominium units in the Lowe Cottage Condominiums: A Camp Mike@ at 106 Lakeshore Drive and A The Birches@ at 112 Lakeshore Drive, in the R-2 zoning district in which seasonal dwelling units are a permitted use. The six camp buildings were constructed and occupied prior to the enactment of the Colchester Zoning Ordinance on a single lot of approximately 40,000 square feet in size.

In 1990 or 1991, the former owners ceased using the two camps at issue in the present case for active residential use. The apparently removed the moveable furniture preparatory to renovations. The 1991 Zoning Regulations became effective on September 17, 1991. Material facts are in dispute at least as to the date the furniture was removed, and the date of commencement of the Chittenden Superior Court litigation which resulted in a March 25, 1993, court order that the units be allowed to be used as seasonal dwellings. In April, 1993, the Town issued building permits allowing renovations and repairs A per court order.@ Material facts are in dispute as to what renovations and repairs beyond the foundations were allowed or required as of the April 1993 permits, and as to the circumstances of the former owners= work on or use of the camps between that date and Appellants= purchase of the camps. The Zoning Administrator informed Appellants by letter in November 1997 that the two units had lost their A pre-existing, non-conforming status@ because the pre-existing seasonal residential use had not been reestablished within a year, citing ' 1801.1(c) of the 1997 Zoning Regulations. Material facts are in dispute as to which events are determinative and therefore which edition of the Zoning Regulations applies. Material facts are also in dispute as to whether the elements of estoppel have occurred so that the Town should be estopped from contesting Appellants= renovation and seasonal residential use of the camps.

On appeal from this Court= s first summary judgment ruling, the Vermont Supreme Court held that the Environmental Court had to consider not only whether the preexisting use of the camp buildings was nonconforming, but also whether the preexisting use of the land was nonconforming. As the preexisting use of the land was for six separate single-family seasonal residences (camps) on a single lot, in a zone in which only one dwelling is permitted per lot, it would be possible for abandonment to occur with regard to any one or more of the camps, up to five of them, before the use of the land would become a conforming lot. If the preexisting nonconformity did not lawfully exist prior to the 1997 Regulations, then it may not be continued thereafter. In re Gregoire, 10 Vt. L. W. 335, 336 (1999). That is, a subsequent owner may be bound by the abandonment of a previous owner. Accordingly, the Court remanded for the Environmental Court to determine whether the previous owners of Appellants= two camps had abandoned the nonconforming use status of the camps.

After remand, the parties again moved for summary judgment. The Court found material facts to be in dispute both on the elements of abandonment and the elements of estoppel, but also noted that the parties had not established the following legal issues: whether the all of the abandonment factors in ' 1801.7 of the 1982 Zoning Regulations (or the equivalent section of the 1991 Zoning Regulations) must be found to find abandonment, and whether the 1997 Zoning Regulations= abandonment provisions are applicable, as they appear to lack an abandonment provision applicable to residential uses. The parties filed supplementary motions for summary judgment.

First, the choice of whether to apply the 1982, the 1991 or the 1997 Regulations will depend upon the period claimed by the Town to have constituted abandonment. If the Town claims that the Gregoires= predecessors abandoned the nonconforming use, then the 1982 or 1991 Regulations are applicable. This appears to be the Town= s position at the present time. If the claimed abandonment period occurred after the 1997 Regulations took effect, then those regulations are applicable. This appears to have been the Town= s position in the decision appealed from. Accordingly, we examine each edition of the regulations in turn.

Under ' 1801.7 of the 1992 Regulations, a nonconforming use A shall be considered abandoned when:

(a) The intent of the owner to discontinue the use is apparent.

(b) The characteristic equipment and furnishings of the non-conforming use have been removed from the premises and have not been replaced by similar equipment within six (6) months.

(c) It has been replaced by a conforming use.

(d) It has been changed to another use under proper permit.

The 1991 Regulations changed the subsection (b) time period to 12 months and removed subsection (d). If the subsections were separated by commas or semicolons and the word A or@ at least between the last two subsections, the section would be clearly disjunctive; that is, any one of the subsections could suffice for abandonment. If the subsections were separated by commas or semicolons and the word A and@ at least between the last two subsections, the section would be clearly conjunctive; that is, all of the subsections must be found to find abandonment. However, the separation of the subsections by periods, even without the word A or@ is sufficient to indicate that it must be construed in the disjunctive.

Appellants argue that a municipality must choose either an intent-to-abandon or a mere discontinuance scheme for governing nonconforming uses, but may not incorporate both in its regulations, citing Badger v. Town of Ferrisburgh, 168 Vt. 37 (1998). In Badger, the Supreme Court noted that 24 V.S.A. ' 4408(b)(3) A provides two alternatives from which a municipality may choose in implementing its policy on resumption of nonconforming uses,@ 168 Vt. at 41, that is, an intent-to-abandon provision and a period-of-non-use provision. The period of non-use substitutes or functions as a proxy for the intent requirement. However, nothing in the Badger decision or ' 4408(b)(3) prohibits a town from implementing both, as Colchester has done. Thus, if the Town proceeds to show abandonment under subsection (b) of either the 1982 or the 1991 Regulations, it need not prove intent.

If no abandonment occurred prior to the adoption of the 1997 Regulations in September of 1997, then no abandonment can be found, because the 1997 Regulations lack an abandonment provision applicable to residential uses, whether that result was intended or not at the time of their adoption. The 1997 Regulations distinguish between Class A and B nonconformities. Class A nonconformities apply to residential uses, ' 1801.1, while Class B nonconformities apply to commercial, industrial and multi-family uses. ' 1801.2 . Class B nonconformities are subject to an

abandonment provision identical to that in the 1991 Regulations. However, Class A nonconformities are not subject to any abandonment provision. Rather, ' 1801.1(c) only regulates the reconstruction of damaged structures within one year.

As material facts remain in dispute on the elements of abandonment and estoppel, or at least have not been established by the parties in their motions to date, an evidentiary hearing should be scheduled in this matter. We will hold a telephone conference to discuss such scheduling on February 16, 2001, in the morning. If the parties prefer an earlier conference, they may call the Court to arrange for the telephone conference to take place at 11:30 or 12:30 on Friday, January 19, 2001.

Done at Barre, Vermont, this 12th day of January, 2001.

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Merideth Wright
Environmental Judge

Footnotes