

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2001-400

FEBRUARY TERM, 2002

In re Appeal of Gregory and Sharon Parke	}	APPEALED FROM:
	}	Environmental Court
	}	
	}	DOCKET NO. 55-4-01 Vtec
	}	Trial Judge: Merideth Wright
	}	
	}	

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

Appellants challenge the environmental court's determination that the City of Rutland zoning regulations do not require a building permit to erect a fence. We affirm.

In the fall of 2000, appellees began replacing an existing five-foot-high fence that separated their property from appellants' property with an eight-foot-high fence. When appellants objected to the fence, appellees sought a determination from the City of Rutland zoning administrator as to whether they needed a permit for the fence and whether the fence was subject to setback provisions contained in the zoning regulations. The zoning administrator concluded that the regulations do not require permits for fences or walls, and that the setback requirements apply to buildings and not fences. On appeal, the zoning board of adjustment upheld the administrator's decision, stating that (1) the zoning regulations do not regulate fences; (2) even if the regulation of fences could be implied, the regulations contain no guidelines under which a permit could be issued; and (3) regulating fences as buildings subject to setback requirements would effectively ban fences in the vast majority of city lots. On further appeal, the environmental court granted appellees' motion for summary judgment, concluding that the zoning ordinance does not require a permit to erect a fence.

On appeal, appellants reason as follows. Section 5717 of the City of Rutland zoning ordinance regulates accessory uses and accessory buildings. Use of an accessory building is defined in § 5702 of the ordinance as a use of land or "structure" or building customarily incident to the principal use of the land or building to which it is accessory. Under 24 V.S.A. § 4303 (11), the word "Structure" is defined as "an assembly of materials for occupancy or use, including, but not limited to, a building, mobile home or trailer, billboard, sign, wall or fence, except a wall or fence on an operating farm." (Emphasis added.) Appellants acknowledge that municipalities are not required to adopt the definitions contained in § 4303, see 24 V.S.A. § 4406 (setting forth requirements that must be adopted as part of municipal zoning regulations), but they contend that the City of Rutland did so in § 5701 of its zoning ordinance by stating that the purposes of the ordinance are to promote health and safety and to protect and conserve property values as "in accordance with the Municipal Zoning Enabling Law, 24 V.S.A. § 3001 et seq."

These arguments do not withstand scrutiny. Section 5701 appears to do nothing more than state that the purposes of the zoning regulations are in accordance with state zoning law. Even if we were to construe the language quoted above as incorporating into the zoning regulations the provisions of state law, including the definitions contained in § 4303, those sections of state law referred to in the ordinance were repealed effective March 23, 1968. See 1967, No. 334 (Adj. Sess.), § 2. Under repealed § 3001 of Title 24, the word "Structure" is not defined to include fences, but rather to mean

"an edifice whether or not constructed on permanent foundation and includes any and all outdoor advertising devices or displays." See Webster's New World Dictionary 431 (3d ed. 1988) ("edifice" is "a building, esp. a large, imposing one"). We reject appellants' claim that the ordinance's single reference to a repealed statute incorporates a successor statute containing substantively different language on the salient point.

Turning to § 5717 of the zoning ordinance, that provision addresses setback requirements for accessory buildings in subsection (a), identifies garages and storage spaces as accessory uses in subsection (b), limits the use of garage buildings in subsection (c), and restricts the dimensions of accessory buildings in subsection (d). Under the commonly understood meanings of the terms contained therein, none of these subsections apply to fences. Further, as the zoning board noted, construing subsection (a) to include fences would effectively ban fences on a vast majority of city lots. It may be an aberration for a zoning ordinance to exclude regulation of fences within the municipality, but the City of Rutland's ordinance plainly does so.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice