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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-259

APRIL TERM, 2008

In re Boutin PRD Amendment (Appeal of Boutin)	} } } } } } }	APPEALED FROM: Environmental Court DOCKET NO. 93-4-06 Vtec
		Trial Judge: Merideth Wright

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

Appellants Steven and Courtney Boutin appeal from an Environmental Court decision denying their application to amend a planned residential development in the Town of Fletcher. They contend: (1) the court erred in rejecting their claim that a development restriction on their lot had expired by its terms; and (2) the court lacked authority to interpret and enforce the restriction. We affirm.

The material undisputed facts may be summarized as follows. In the late 1980s, William and Thomas Hannon applied to the Town Planning Commission to develop a six-lot residential subdivision on a 17.83-acre parcel located within the Rural Residential/Agricultural (RR/A) zoning district.[1] Single-family dwellings and residential lodging were permitted uses within the district. The minimum lot size within the district was two acres. Section 780 of the zoning bylaws then in effect, however, authorized certain modifications of the bylaws for the creation of a "planned residential development" (PRD) in order "to enable clustering and other innovations in design and more efficient uses of land."

The Hannons proposed a PRD in which five of the lots would be under two acres in size, and one, Lot 6, would be over six acres. In late 1989, the Planning Commission approved a sketch plan for the project subject to a number of conditions, including a requirement that the applicant submit as part of its application for final plat approval "a proposed open space easement, conservation restriction, or similar instrument which provides that [Lot 6] shall never be developed." This requirement was in conformity with § 780(C)(5) of the bylaws, which provided that "[w]here the clustering of uses in a project will result in open or undeveloped space on the tract, the Planning Commission shall condition approval of the project upon the establishment of an open

[1] The original application was for seven lots, and Lot 6 was originally labelled Lot 7, but this was later modified.

space easement, conservation restriction, or similar instrument for such portion of the tract to ensure conformance with subsection (3) above." Subsection (3) addressed allowable density with any such development, and provided, in part, that while "[d]ensity may vary within the development . . . in any [PRD], the number of dwelling units shall not exceed the number which could be permitted, in the Planning Commission's judgment, if the land were subdivided into lots in conformance with the applicable district requirements of this bylaw."

In their application for final plat approval, the Hannons submitted an engineering plan and a letter from William Hannon that proposed to comply with the open-space condition by means of a restrictive covenant to be included in the deed for Lot 6. The proposed covenant provided that the grantees "waive development rights to construct or erect any temporary or permanent structure or building on the parcel of land conveyed herein until future amendment of the zoning district density may provide for additional development of the tract in accordance with Section 780(c)(5) of the [zoning bylaws]." The Planning Commission minutes from a hearing in May 1990 indicate that the application, including the engineering plans and letter, were deemed approved by virtue of the absence of a quorum and the passage of time.

In 1993, the Hannons conveyed Lot 6 to the Moores, who conveyed it, in turn, to the Boutins (appellants herein) in August 2005. Consistent with the open-space condition, both deeds included a restrictive covenant that tracked the language in the Hannon letter. In early 2006, appellants applied to amend the PRD, seeking to build a house on Lot 6. The Design Review Board (successor to the Planning Commission) denied the application based on the development restriction on Lot 6. Appellants then appealed to the Environmental Court, raising for review the question whether the development restriction on Lot 6 had "expired according to its terms."[2]

The parties filed cross-motions for summary judgment. Appellants claimed that the development restriction had expired with the enactment of a 2002 amendment to the Town's zoning bylaws which added two-family dwellings to the list of permitted uses within the RR/A zoning district. As a result, they argued, the allowable density within the district had doubled, thereby satisfying the condition in the restriction precluding development of Lot 6 "until future amendment of the zoning district density may provide for additional development of the tract." The court disagreed, noting that the 2002 amendment had also specifically amended the provision in the bylaws dealings with PRD density, to provide as follows: "The total number of dwelling units shall not exceed that which would be permitted in the DRB's judgment, if the parcel were subdivided into buildable lots in conformance with the district minimum lot area requirement <u>for single family dwellings</u>." (Emphasis added). Thus, the court concluded that the density for the PRD had not increased under the 2002 amendments, and that the restriction on Lot 6 had not expired by its terms. Accordingly, the court entered summary judgment in favor of the Town. The court denied appellants' subsequent motion for reconsideration, rejecting an argument not previously raised: that the court lacked jurisdiction to address the issue because it concerned the interpretation of a private deed restriction more properly before the superior court. The court thereafter entered final judgment in favor of the Town. This appeal followed.

We review a summary judgment under the same standard as the trial court, and will affirm such a judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. <u>In re Curtis</u>, 2006 VT 9, ¶ 2, 179 Vt. 620 (mem.). We will defer to the

[2] The Moores had also applied to the Planning Commission to subdivide and develop Lot 6, but the application was denied and no appeal was taken.

Environmental Court's interpretation of zoning provisions unless it is clearly erroneous, arbitrary, or capricious. In re Wesco, Inc., 2006 VT 52, ¶ 7, 180 Vt. 520. Assessed in light of these standards, the court's ruling here is evidently sound. Appellants would have us focus narrowly on the phrase in the 1990 PRD condition precluding development of Lot 6 until future amendment of the "zoning district density" may provide for additional development. In light of this language, they argue that the only relevant bylaw amendment in 2002 was that which effectively increased the density in the RR/A zoning district by authorizing duplex residences. They would assign no relevance, therefore, to the qualifying language simultaneously added to the PRD section which provided that density of "dwelling units" within a PRD would continue to be limited based on the number of single-family dwellings otherwise allowed.

The development restriction cannot, however, be so narrowly construed. As noted, it provides for a waiver of development rights "until future amendment of the zoning district density may provide for additional development of the tract in accordance with Section 780(c)(5)" of the zoning bylaws. Thus, the restriction expressly references and incorporates the PRD density limits contained in the zoning bylaws, and evinces a clear and unambiguous intent by the Town to condition any future development of Lot 6 on changes consistent with those density limits. Accordingly, the trial court was correct in concluding that the density limitation and, therefore, the development restriction on Lot 6 did not, as a result of the 2002 amendments, expire by its terms.

Appellants also contend that the interpretation and enforcement of a restrictive covenant lies outside the jurisdiction of the Environmental Court. The court, however, correctly observed that the issue before it concerned the interpretation and application of a PRD open-space condition approved by the Planning Commission which, as authorized by the bylaws, the applicant had merely effectuated by means of a restrictive covenant. See, e.g., In re Hildebrand, 2007 VT 5, ¶ 2 (reviewing Environmental Court decision concerning application to amend subdivision permit that contained, as a condition of approval, a requirement of deed covenants to preserve certain lots as meadowland). Accordingly, the claim is entirely without merit.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice