Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

GILMORE ROAD LLC	)	
	)	**Windsor Superior Court**
v.	)	**Docket No. 563-8-08 Wrcv**
	)	
TOWN OF PLYMOUTH	)	

DECISION
Defendant's Motion to Dismiss (MPR #3), filed Oct. 30, 2008

Plaintiff Gilmore Road LLC seeks judicial review of a driveway access permit issued by defendant Town of Plymouth under 19 V.S.A. § 1111(b). The present matter before the court is the Town of Plymouth's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. V.R.C.P. 12(b)(6). Gilmore Road is represented by attorney Lawrence G. Slason. The Town of Plymouth is represented by attorney William E. Flender.

The complaint contains only the following allegations.[1] Gilmore Road submitted an application for driveway access permits for a five-lot subdivision. The Plymouth Selectboard granted a permit, but authorized access for only one lot. The complaint alleges that "denial of the access permit was improper, without legal justification and arbitrary," but does not specify why denial was improper. The complaint seeks reversal of the Selectboard's decision and issuance of the requested permits.

The Town of Plymouth has moved to dismiss the complaint for failure to state a claim upon which relief can be granted. It argues that Rule 74 does not apply because there is no statutory right to appeal from a denial of a driveway access permit, and that Rule 75 does not apply because the complaint does not state a claim upon which relief in the nature of mandamus or certiorari can be granted. In particular, the Town argues that the complaint does not show that the denial of the permit was a quasi-judicial act.

Property owners are required to obtain written permits from the town selectboard before constructing driveways that provide access to and from town highways. 19 V.S.A. § 1111(a), (b). The statute prohibits the construction of driveways without a permit, and requires compliance with local ordinances and regulations as a condition of any permit. *Id.* In addition, § 1111(b) sets forth the responsibility of the selectboard with respect to issuance of driveway access permits, as follows:

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[1] The court has not considered the facts and evidentiary materials offered by Gilmore Road in opposition to the motion to dismiss. Those materials are "matters outside the pleading" for purposes of Rule 12(b)(6). See *Condosta v. Grussing*, 144 Vt. 454, 459 (1984) (explaining that motions to dismiss are not converted into motions for summary judgment when the court does not consider matters outside the pleadings, even though submitted by the parties).

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> [The selectboard] may make such rules to carry out the provisions of this section as will adequately protect and promote the safety of the traveling public, maintain reasonable levels of service on the existing highway system, and protect the public investment in the existing highway infrastructure, but shall in no case deny reasonable entrance and exit to or from property abutting the highways, except on limited access highways, using safety, maintenance of reasonable levels of service on the existing highways, and protection of the public investment in the existing highway infrastructure as the test for reasonableness, and except as necessary to be consistent with the planning goals of 24 V.S.A. § 4302 and to be compatible with any regional plan, state agency plan or approved municipal plan.

Section 1111(b) therefore requires the selectboard to evaluate each application for a driveway access permit and evaluate whether issuance of a permit would be reasonable in light of considerations of safety, maintenance of reasonable levels of service on existing highways, protection of the public investment, and consistency with specified planning goals.

The question is whether the denial of a driveway access permit is subject to judicial review. There is no statutory right to review, so Rule 74 does not apply. Any right to review must arise under Rule 75(a), which provides for review of governmental action when such review is "otherwise available by law." *Richards v. Town of Norwich*, 169 Vt. 44, 46–47 (1999); *Molesworth v. Univ. of Vermont*, 147 Vt. 4, 6–7 (1986). Rule 75 represents the modern equivalent of the extraordinary writs that existed at common law, including mandamus, certiorari, and prohibition. *Ahern v. Mackey*, 2007 VT 27, ¶ 8, 181 Vt. 599 (mem.).

The complaint does not clearly state the nature of the relief sought, but rather identifies a governmental decision and alleges that the decision was "improper, without legal justification and arbitrary." The court views this as a request for relief in the nature of certiorari, which allows limited review of quasi-judicial acts of local government and is confined to substantial questions of law affecting the merits of the case. *Richards*, 169 Vt. at 47; *Hunt v. Village of Bristol*, 159 Vt. 439, 441 (1992); *Burroughs v. West Windsor Bd. of Sch. Dirs.*, 141 Vt. 234, 237 (1982).

The Town argues that the certiorari review is not available because decisions regarding driveway access permits are not quasi-judicial in nature. There is some evidence to support the conclusion that the decision is quasi-legislative: § 1111(b) describes the permitting process in the context of rulemaking, and calls for consideration of policy matters of general importance (such as public safety and town planning goals) in connection with the issuance of driveway access permits.

The court concludes, however, that selectboards act in a quasi-judicial capacity when they grant or deny an individual property owner's application for a driveway access permit. The determination requires application of generalized safety and planning considerations to the specific circumstances of the individual applicant, and has the effect of determining property rights related to a specific parcel of land. Notice and an opportunity for hearing were appropriate as a matter of procedural due process, even if not expressly provided for by statute. *In re St. George*, 125 Vt. 408, 413 (1966). These qualities tend to show that the decision was adjudicatory or quasi-judicial in nature, rather than legislative. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915); *Davidson v. Whitehill*, 87 Vt. 499 (1914). Review in the nature of certiorari may therefore be appropriate in this case, and the motion to dismiss for failure to state a claim is denied.

The role of the court when conducting review in the nature of certiorari is not to determine whether the Selectboard arrived at the correct result based on the facts before it, but rather whether it made a substantial legal error. Certiorari review is not *de novo*. *Moleworth*, 147 Vt. at 6; *Burroughs*, 141 Vt. at 237. Instead, it is limited to "keeping the inferior tribunal within the limits of its jurisdiction and insuring that that jurisdiction is exercised with regularity." *Rhodes v. Town of Woodstock*, 132 Vt. 323, 325 (1974). The determination of factual issues remains the exclusive province of the Town. *Burroughs*, 141 Vt. at 237.

Certiorari review is normally based on the record created before the lower tribunal, *State v. Forte*, 159 Vt. 550, 554 (1993), but the court may take testimony as needed to facilitate its review when the record has not been adequately preserved. *Id.* at 554–55 n.2; *Chapin Hill Estates, Inc. v. Town of Stowe*, 131 Vt. 10, 13 (1972); *Rutter v. Burke*, 89 Vt. 14, 31 (1915). The need for additional evidence depends upon the specific legal issues raised by the petitioner in the particular circumstances of the case and the quality and completeness of the record, and is only relevant to the extent that it sheds light upon the precise manner in which the Selectboard is alleged to have acted outside the limits of its jurisdiction. *Rhodes*, 132 Vt. at 325.

The complaint may also be viewed as seeking relief in the nature of prohibition, which is designed "to prevent the unlawful assumption of jurisdiction by a tribunal contrary to common law or statutory provisions." *Petition of Mattison and Bentley*, 120 Vt. 459, 463 (1958). If that is the case, the need for evidence or testimony depends upon the specific manner in which petitioner contends that the selectboard assumed unlawful jurisdiction over the subject matter, and evidence is only relevant to the extent that it tends to show the same.

Although the court has concluded that the complaint should not be dismissed, cf. *Hunt*, 159 Vt. at 442, the complaint does not specify the manner in which the selectboard is alleged to have acted outside the limits of its jurisdiction or assumed unlawful subject-matter jurisdiction over the proceedings. To help advance the litigation, Plaintiff is ordered to submit within ten days a more particular statement of its claim: what is the specific manner in which it claims the Selectboard acted improperly? Plaintiff's

statement shall conform to the limitations of the review available under Rule 75 as discussed above. The case will be set for a status conference shortly thereafter at which the parties shall be prepared to address the extent to which, if any, the court may need to take testimony in connection with a dispositive motion or hearing.

ORDER

For the foregoing reasons, Defendant Town of Plymouth's motion to dismiss is *denied*. Plaintiff shall make a more definite statement of their claim within ten days. This case shall be set for a status conference shortly thereafter.

Dated at Woodstock, Vermont this 6 day of January 2009.

Hon. Harold E. Eaton, Jr.
Superior Court Judge