

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00114

In re Swett NOV Appeal

MERITS DECISION

In this matter, Carol and Brian Gates (together, the Gates) appeal a decision of the Town of Mendon Zoning Board of Adjustment (ZBA) voiding a Notice of Violation issued by the Town of Mendon (Town) Zoning Administrator on August 16, 2022 to Elizabeth Swett regarding her property located at 48 Tara Lane, Mendon, Vermont (the Subject Property) (together, the NOV). Ms. Swett appealed the NOV to the ZBA, which heard the appeal on October 11, 2022. The ZBA granted the appeal and voided the NOV. The Gates appealed that ZBA decision to this Court.

The Court and parties complete a site visit to the Subject Property and the surrounding area on June 14, 2023. As explained in advance of and during the site visit, the site visit was an opportunity for the parties to ask the Court to observe certain items to put evidence received during the trial into context. No evidence was taken during the site visit.

Elizabeth Swett is represented by attorney Rodney E. McPhee. Carol and Brian Gates appear self-represented. The Town of Mendon did not appear before the Court in this matter.

On July 25 and July 26, 2023 this Court held a merits hearing in this matter via the WebEx platform.

Statement of Questions

Appellants filed a revised Statement of Questions (Revised SOQ) on February 3, 2023. The Revised SOQ expresses two (2) questions as follows:

1. We would like a determination of whether the discharge of water found on the 48 Terra Lane Property is coming from a "Well" or a "Spring?"
2. Can the Environmental Court [SIC] determine whether or not the Property Improvement done by the Appellant directly above the "Spring" or "Well" contributed

to the flow of surface and/or subsurface water onto the adjacent property being in Violation of Section 402(7) of the Town of Mendon Zoning Regulations?

Revised SOQ, filed on Feb. 3, 2023.

Findings of Fact

1. Elizabeth Swett (Ms. Swett) is the owner of property located at 48 Terra Lane in Mendon, Vermont (previously defined as the Subject Property).
2. The Subject Property is in the Terra Lane Subdivision.
3. The Subject Property contains Ms. Swett's residence.
4. The Swett house was constructed in 1978, and Ms. Swett purchased the Property in 2011.
5. The Gates own property to adjoining the Property's southern boundary identified as Lot #24 on the so-called Welsh Survey, admitted as Swett Exhibit 49 at trial (the Gates Property).
6. The Gates Property is at the low elevation point of the Terra Lane Subdivision and is a lower elevation than the Subject Property.
7. The Gates argue that Ms. Swett has directed, diverted, or maintained stormwater flow so that damage was caused to the Gates Property.
8. A belowground spring is located on the Subject Property near the common boundary with the Gates property.
9. The spring has been in its present location for more than 140 years and pre-existed the Terra Lane Subdivision.
10. The water rights to the spring belong to the farm property which was formerly owned by of Alonzo Ormsby and Emerson D. Williams.¹
11. Mr. Gates dug up underground pipes on the Gates Property that were part of the spring water distribution system.
12. The Gates diverted water that was coming onto the Gates Property from the spring and other sources so that it flows away from the center of the Gates Property. This was accomplished by digging a large trench along the northern boundary of the Gates Property, where it adjoins the Subject Property.

¹ This Court lacks jurisdiction over private property rights but includes this fact for background as it appears undisputed. See In re Woodstock Cmty. Tr. & Hous. Vt. PRD, 2012 VT 87, ¶¶ 40, 41, 192 Vt. 474 (“[T]he Environmental Division does not have jurisdiction to determine private property rights.”).

13. Ms. Swett was not aware of the spring on the Subject Property until the Gates started complaining that water was running from the spring onto the Gates Property.

14. Ms. Swett did not undertake any modification, other action, or any property improvement relating to the spring.

15. There is no evidence that the Gates Property was damaged by any water from the spring or that any alleged damage was not the result of the Gates' activity on the Gates Property, such as digging up the pipes, digging the trench, or cutting many trees on the Property.

16. Water that is coming out of the spring is not stormwater.

17. There are drainage ditches on the Subject Property that predate Ms. Swett's ownership and which she occasionally has maintained over the course of her ownership.

18. There is no evidence that the drainage ditches are connected to the spring.

19. While there is evidence that the Gates Property would be classified as wet property, there is no evidence that the spring and its distribution system were leaking before being dug up.

20. Stormwater enters the Gates Property through a culvert under Terra Lane from property owned by a third party that is not before the Court.

21. On August 16, 2022, the Town Zoning Administrator issued the NOV stating that "water from what appears to be an abandoned well . . . [was] draining onto adjoined property" in violation of the Regulations.

22. Ms. Swett timely appealed the NOV to the ZBA.

23. In October 2022, the ZBA granted the appeal and voided the NOV.

24. The Gates timely appealed the ZBA decision to this Court.

Conclusions of Law

The Questions before the Court ask for a determination as to whether there are discharges coming from the Subject Property from a well or spring in violation of the Town of Mendon Zoning Regulations (Regulations) § 402(7). While it appears undisputed that the water source on the Subject Property at issue in this appeal is a spring,² based on the foregoing findings

² Such a lack of dispute effectively resolves Question 1 of the Statement of Questions, the water source is, by general agreement of the parties, a spring.

of fact, we conclude that the existence of the spring and water therefrom is not a violation of Regulations § 402(7).

In interpreting zoning ordinances, we apply the rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, we “construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” Id. (citations omitted). If there is no plain meaning, we will “attempt to discern the intent from other sources without being limited by an isolated sentence.” In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, our paramount goal is to implement the intent of its drafters. Morin v. Essex Optical/The Hartford, 2005 VT 15, ¶ 7, 178 Vt. 29. We will therefore “adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578; see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49, 195 Vt. 586 (1986)) (“Our goal in interpreting [a zoning regulation], like a statute, ‘is to give effect to the legislative intent.’”). Finally, because zoning regulations limit common law property rights, we resolve any uncertainty in favor of the property owner. Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22. With these provisions of interpretation in mind, we turn to the Regulations.

Regulations § 402, generally, sets forth performance standards for all activities. Regulations § 402. It states, generally, that “[n]o land or building in any zoning district shall be used or occupied in any manner so as to create dangerous, injurious, noxious or otherwise objectionable conditions in such a manner or in such amount as to adversely affect the reasonable use of the surrounding area or adjoining properties.” Id. It goes on to set forth specific standards to implement this purpose. Specifically relevant here and the crux of the dispute between the parties is subsection (7). Regulations § 402(7) states:

Stormwater Management: No property improvement shall direct, divert or maintain waterflow so that damage or pollution is caused to other property by surface or subsurface waters. Stormwater management systems shall incorporate natural drainage systems; maximize on-site infiltration and treatment; and minimize surface runoff.

Regulations § 402(7) (emphasis in original).

We begin with a threshold matter. Section 402(7) is specific to stormwater. It does not address other types of water flows, such as pre-existing springs or wells. Mrs. Gates testified at trial that they believed that damage to the Gates Property did not occur from stormwater, but from spring water. After being reminded that § 402(7) was specific to stormwater, the Gates attempted to reframe their concerns and argue that, effectively, all water is stormwater such that the spring water can be included within the scope of the Regulations. We decline to read Regulations § 402(7) so broadly. Section 402(7) specifically states that it relates to “stormwater management” and addresses “stormwater management systems.” There is no ambiguity in the interpretation of this provision. To the extent that there is any such ambiguity, we must resolve it in the landowner’s favor, here Ms. Swett, and conclude that Regulations § 402(7) is limited to stormwater.

The evidence presented shows that Ms. Swett, or her agents, did nothing to “direct, divert, or maintain” stormwater on the Subject Property causing damage to the Gates Property. The spring pre-existed Ms. Swett’s ownership of the Subject Property, potentially by many decades. There is no evidence that Ms. Swett did anything in relation to the spring on the Subject Property. There is no evidence that the spring water is stormwater within the scope of the Regulations. Thus, we have been presented with no evidence that any alleged damage to the Gates Property from the Swett Property is coming from stormwater.

Further, the parties disputed at trial the existence of surface drainage ditches on the Subject Property that predated Ms. Swett’s ownership but were maintained over the course of her ownership.³ There is no evidence that these existing ditches are connected to the spring or impact its flows.⁴ Again, the spring and water coming from it are the basis of this matter. Thus, there is no evidence that any activity related to these ditches, including general maintenance of the pre-existing ditches, caused damage or pollution to the Gates Property.

³ The Gates alleged that Ms. Swett, through an agent, caused a new ditch to be created near the Swett driveway in connection with the extreme rain Vermont received in July 2023, shortly before this Court held its merits hearing on this matter. This activity is outside of the scope of the NOV before the Court, and therefore, the Court cannot consider whether the ditch would be a violation of the Regulations.

⁴ It further appears that the ditches were not considered by the ZBA or Zoning Administrator below. See Swett Ex. 53.

We therefore conclude that Ms. Swett is not in violation of § 402(7), as there is no evidence that she or her agents did anything to “direct, divert or maintain [storm] water flow so that damage or pollution [was] caused to other property[.]” Regulations, §402(7). Thus, we resolve the thrust of Question 2 (i.e., whether there was an improvement in violation of Regulations § 402(7)) in the negative.

Conclusion

For the foregoing reasons, we conclude that there is no evidence that Ms. Swett did anything on the Subject Property to “direct, divert or maintain [storm] water flow so that damage or pollution [was] caused to other property” and, therefore she is not in violation of the Regulations.

This concludes the matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed this 31st day of August 2023 pursuant to V.R.E.F. 9(D)

A handwritten signature in black ink that reads "Tom Walsh". The signature is written in a cursive, somewhat stylized font.

Thomas G. Walsh, Judge
Vermont Superior Court, Environmental Division