STATE OF VERMONT

ENVIRONMENTAL COURT

In re: Appeal of Willis Wendell III	} } } }	Docket No. 16-2-99 Vtec

Decision and Order

Appellant appealed from a January 1999 decision of the Zoning Board of Adjustment (ZBA) of the Town of Manchester denying his request to remove conditions 13 and 14 from a 1996 permit for a 2-lot subdivision. Appellant is represented by Thomas A. Greene, Esq., Appellees Michael and Ingunn Bassock are represented by W. Michael Nawrath, Esq.; the Town is represented by Robert E. Woolmington, Esq. At the scheduled hearing, the parties agreed to the submission of the case on agreed exhibits and written memoranda.

A portion of the history of the land at issue in the present case is necessary to this decision. In 1978 the common grantor transferred two lots to Appellant's predecessor. The common grantor retained a 20-foot-wide deeded right-of-way over those lots to the road, for the benefit of a third lot retained by the common grantor. The common grantor also held additional land further from the road than that third lot.

In May of 1979, the common grantor entered into and recorded a contract to sell the third lot, including its right-of-way, to Appellees. The warranty deed was not recorded until 1987. In 1980, the common grantor transferred a portion of the additional land behind the third lot to Appellees, and purported with that transfer to provide access to the road via a right-of-way not only over the third lot under contract to Appellees but also over Appellant's two lots, even though the common grantor no longer held that land. The Bennington Superior Court ruled that only the third lot had a deeded right-of-way over Appellant's two lots, and that Appellees' land further from the road did not have any right, title or interest in the deeded right-of-way. However, the Bennington Superior Court left open the possibility that Appellees' land further from the road may be entitled to an easement by adverse

possession or by necessity.

In 1996, Appellant obtained a permit to subdivide one of his lots into two, shown on the subdivision plan (Town's Exhibit 4) as Lots 2 and 3. Lot 2 is 2.26 acres in size and contains an existing house; Lot 3 is vacant and is proposed for development with a single-family house. Lot 3 has access to the road by the 20-foot-wide right-of-way along the westerly side of Lot 2. Lot 2 appears to have access to the road by an approximately 50-foot-wide strip which is part of Lot 2 itself. Lot 3 is the minimum lot size in this zone: exactly 2 acres in area[1].

Section 8.7(3) of the Zoning Ordinance allows up to two lots without road frontage to use a private right-of-way less that 50 feet in width for access. Because one of Appellees' lots already has access by the right-of-way, Lot 3 of Appellant's subdivision would be the second allowed lot, without regard to the claim of Appellees' landlocked lot. If Appellees' landlocked lot were counted, then Appellant's subdivision would not have qualified for approval. The ZBA had no jurisdiction to resolve the disputed property rights, and attempted to issue the subdivision

The permit provided in conditions 13 and 14 that:

> Condition 13: This permit shall be revoked in the event (i) that the 20-foot ROW is used to gain access to any other lot without frontage, or (ii) if the owner of any other lot without frontage obtains the right to use the 20-foot ROW by court decree, contract, license or other legal means.
> Condition 14: Prior to the issuance of a zoning permit to construct a building on the

[1] It is not immediately apparent to the Court why expansion of the right-of-way to fifty feet in width (leaving the traveled portion restricted in width), together with an adjustment of the boundary between Lots 2 and 3 (or an adjustment of the boundary between Lot 3 and Appellees' lot) to give Lot 3 the required 2 acres, would not resolve both the zoning dispute and the dispute between Appellant and Appellees. The parties may wish to pursue such a resolution with the assistance of a mediator, even though it is beyond the jurisdiction of the Court in this particular case.

vacant lot now or formerly owned by Wendell [i.e., Lot 3], the landowner(s) shall acknowledge in writing, that they are aware of the possibility of permit revocation, and if the permit is revoked, the possible ramifications, including but not limited to enforcement action, fines, or removal of the permitted building.

In the present proceeding, Appellant applied to the ZBA to eliminate these two conditions after the Bennington Superior Court had ruled; and appealed to this Court from the ZBA's denial of that request.

Appellant argues that the Bennington Superior Court ruling concluded the issue for which those two conditions were imposed, and that the conditions unduly burden his rights to develop Lot 3. Appellees and the Town point out that the Bennington Superior Court order did not resolve whether Appellees may be entitled to an easement by necessity, and further that it remains possible for a successor to Appellant in the future to grant a new private easement over Lot 3 for Appellees' landlocked lot, which could render Lot 3 noncomplying as to lot size or as to §8.7(3).

The Bennington Superior Court order merely ruled that Appellant (plaintiff in that action) was not entitled to summary judgment. As such, it did not eliminate the possibility that Appellees might be entitled to an easement by necessity. Further, it did not eliminate the possibility that a resolution of Appellees' access could render Lot 3 noncomplying as to lot size or as to §8.7(3).

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that conditions 13 and 14 of the 1996 permit shall remain in effect, without prejudice to any future request to amend that permit to delete them, should circumstances change.

Done at Barre, Vermont, this 18th day of February, 2000.

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Merideth Wright
Environmental Judge