

STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Appeal of	}	
Alan and Ruth Krawczyk, <u>et al.</u>	}	Docket No. 128-7-99 Vtec
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	}	
	}	

Decision and Order on Motion for Partial Summary Judgment

A group of Appellants appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Shaftsbury granting a conditional use permit to Appellee-Applicant Tillerman, Inc. to operate a “dairy bar/restaurant.” Appellants are represented by Orland Campbell, Jr., Esq.; Appellee-Applicant Tillerman, Inc. represents itself through its Secretary/Treasurer Jayne L. Outwater, who is not an attorney; the Town is represented by Robert E. Woolmington, Esq. Appellants have moved for summary judgment on Questions 1 and 2 of the Statement of Questions.

Appellee-Applicant is under contract to purchase a pre-existing parcel of land with an existing building located on the corner of Ledgey Drive and Route 7A, in the Village Commercial zoning district. Appellee-Applicant proposes to renovate the building and to conduct a business on the property consisting of a dairy bar/restaurant offering take-out service, eight seats and video game machines. The lot is approximately 16,560 square feet in area; the minimum lot area requirement in this zoning district is 20,000 square feet. §6.1.3 of the Zoning Bylaws. Therefore the lot is a pre-existing parcel, nonconforming as to lot area¹.

¹ The parties do not raise the question of whether §7.1.1.2 of the Zoning Bylaws also applies to the change from residential use to commercial use of the building on this parcel. Compare, In re Appeal of Miserocchi, Docket No. 99-166 (Vt. Supreme Ct., January 28, 2000).

Question 1 of the Statement of Questions addresses whether the proposed use of the property is a permitted use in the Village Commercial zoning district. The permitted uses in the Village Commercial district are defined in §6.1.2 as those uses enumerated in §4.2.1, the section establishing the permitted uses in the VR (Village Residential) districts. Permitted uses under §4.2.1 are single and multi-family dwellings, accessory uses customarily incidental to the permitted uses (such as garages and family gardens), and also certain listed “group service uses” (not including restaurants). Under §4.2.2, the minimum lot area for group service uses is 80,000 square feet. Because Appellee-Applicant’s project is not a single or multi-family dwelling, is not an accessory use to a permitted use, is not a group service use listed in §§4.2.1.3 through 4.2.1.8, and is less than 80,000 square feet in area, it is not a permitted use in the Village Commercial district.

Question 2 of the Statement of Questions addresses whether the proposed use of the property is a conditional use in the Village Commercial zoning district. Section 6.1.4 enumerates the conditional uses in the Village Commercial district. Those uses include “restaurants, motels, hotels, bed & breakfast inns, and similar establishments letting rooms or serving meals.” §6.1.4.6. The term “restaurant” is not otherwise defined in the Zoning Bylaws. Appellee-Applicant’s proposed use of the property is to serve take-out food and to provide eight seats for patrons to eat at the establishment. It falls within the definition of a restaurant or similar establishment serving meals.

Appellants argue that the proposed use is sufficiently different from a traditional restaurant that it should not be included within the scope of §6.1.4.6. Some towns have adopted zoning bylaws which distinguish between types of establishments serving meals, such as restaurants with dining room service distinguished from fast food restaurants, or between restaurants with drive-up service distinguished from those without. However, the Shaftsbury Zoning Bylaws do not differentiate between restaurants in which one is served meals or in which one sits down to eat, and establishments which serve meals otherwise, such as cafeterias or fast food restaurants. Neither the ZBA nor this Court can impose a distinction between categories of uses if that distinction is not established in the Zoning Bylaws.

Appellants argue further that certain aspects of the differences between a traditional

dining room type of restaurant and the proposed project will create different burdens on the surrounding neighborhood, for example, in the different traffic patterns generated by the use. Consideration of those differences is part of the task of conditional use approval. Section 3.5 of the Zoning Bylaws sets out the criteria which the ZBA (and hence this Court) is obligated to consider when determining whether a particular proposed project qualifies for conditional use approval. On the merits of this application, the Court will expect the parties to present evidence supporting their respective positions as to whether the proposal will adversely affect the character of the area, traffic on roads and highways in the vicinity, or any of the other criteria for conditional use approval.

Accordingly, based on the foregoing, Appellants' Motion for Summary Judgment is GRANTED as to Question 1 of the Statement of Questions: Appellee-Applicant's project does not fall within the category of permitted uses in the Village Commercial zoning district. Appellants' Motion for Summary Judgment is DENIED and Summary Judgment is granted in favor of the Town and of Appellee-Applicant as to Question 2 of the Statement of Questions: Appellee-Applicant's project falls within the category of conditional uses in the Village Commercial zoning district. A hearing will be set on the merits of Appellee-Applicant's application for the conditional use permit as reflected in the remaining questions in the Statement of Questions.

Done at Barre, Vermont, this 4th day of February, 2000.

Merideth Wright
Environmental Judge