STATE OF VERMONT

ENVIRONMENTAL COURT

In re: Appeal of Stuart L. Richards	}	Docket No. 236-12-99 Vtec

Decision and Order on Cross-Motions for Summary Judgment

Appellant appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Norwich, granting a permit to Paul Nowicki for the construction of a single-family residence at 84 Elm Street. Appellant is represented by John D. Hansen, Esq.; Appellee-Applicant Paul Nowicki is represented by Laura O'Connor, Esq. and John C. Candon, Esq.; the Town of Norwich is represented by its Zoning Administrator, Phil Dechert, who is not an attorney. We note that a number of neighbors have entered their appearance individually as interested parties in opposition to the grant of the permit, and have joined in Appellant's motion for summary judgment.

Appellant and Appellee have filed cross-motions for partial summary judgment on whether Parcel 1 and Parcel 2 of Appellee-Applicant's property have merged so that only one residence may be built on the combined lots, or whether the parcels remain separate so that a residence may be built on Parcel 2, if the proposal meets all other requirements for zoning approval.

Appellee-Applicant's property consists of what were formerly two separate and independent parcels of land: Parcel 1, containing 14,950 square feet, and Parcel 2, containing 24,000 square feet.

Alistair MacDonald acquired Parcel 1 in 1950; it contained a house built approximately 100 years earlier. In 1966, Caryl Smith owned Appellant's property, and MacDonald and Smith jointly owned Parcel 2. In 1967, MacDonald and Smith conveyed Parcel 2 to MacDonald only, with certain building setback restrictions, and conveyed to Smith and her successors a right-of-way for a driveway to serve the Smith property, and a right-of-first-refusal for the future sale of Parcel 2. Appellant is a successor to Smith.

The first Zoning Regulations were adopted in Norwich in 1971. Under that regulation, Parcels 1 and 2 were located in the Residence zoning district within the Norwich Fire District[1]; the minimum lot size requirement was 8,000 square feet. Thus, at that time, both Parcel 1 and Parcel 2 were conforming lots. The Zoning Regulations were amended in 1975, so that the parcels fell within the Village Residential zoning district within the Norwich Fire District. The minimum lot size requirement remained at 8,000 square feet and Parcels 1 and 2 remained as conforming lots.

The 1981 Zoning Regulations changed the minimum lot area for lots in the Residential zoning district to 20,000 square feet. At that time, Parcel 2 was an undeveloped lot, conforming as to lot size for a single-family residential use, and Parcel 1 became a pre-existing, non-conforming lot, developed with an existing house. Under §3.1 of the 1981 Zoning Regulations, the use of Parcel 1 was allowed to continue, even though the lot had become non-conforming as to lot size. Under §3.2, the "Existing Small Lots" provision, lots smaller than the dimensions stated in §7 could be developed as provided in 24 V.S.A. §4406(1).

Under the current 1990 Zoning Regulations, the parcels remain in the Village Residential zoning district in which the minimum parcel size is 20,000 square feet. The term "lot" is defined, in §5.20, as a parcel of land "the boundaries of which are separately described in a recorded deed or filed plat." The boundaries of Parcel 1 and Parcel 2 are separately described in two separate lines of recorded deeds; therefore they fall within the town's definition of separate lots.

Appellee-Applicant acquired both parcels in 1996. In July 1997 he obtained a permit to entirely renovate the existing house on Parcel 1, within the existing footprint. Those

[1] While Appellant's motion states that the property was located in the Rural Residential district where the minimum lot size was 40,000 square feet, the material fact of the parcels' physical location is not in dispute. The court may determine on summary judgment from the various editions of the zoning maps and from the Dechert affidavit the legal consequence of the parcels' undisputed physical location.

renovations have been done. The permit before the Court in the present case seeks approval of plans to construct a residence on Lot 2.

In the present case, the existing small lot provision of the state statute, 24 V.S.A. §4406(1), applies neither to Lot 1 nor to Lot 2. In Lubinsky v. Fair Haven Zoning Board, 148 Vt. 47, 50 (1986), the Supreme Court discussed the "basic purpose" of §4406(1): "to provide that lots of sufficient size whose existence predates the enactment of zoning but whose size does not quite comply with the new zoning law will not go to waste unused, but must be allowed to be developed for purposes consistent with uses permitted in the zone where located." The Court made clear that the "aim is to allow the stated use of lots already existing and not yet developed or built upon." (Emphasis added.) "Existing small lot" provisions regulate the development of undeveloped undersized lots. They do not apply to developed undersized lots, such as Parcel 1, nor to undeveloped lots of sufficient size, such as Parcel 2.

Because the state statute does not apply[2], any discussion of whether the Norwich small lot provision conforms with the state statute would be advisory only. Therefore, we do not reach the parties' arguments on whether the state statute sets a 'floor' or a 'ceiling' for town 'existing small lot' provisions. Appellee-Applicant argues that while the state statute requires towns to give grandfathered status to lots in "individual and separate and non-affiliated ownership" on the effective date of the zoning regulation which made them non-conforming, it allows towns to go beyond the state statute to give grandfathered protection to additional categories of property. Appellant argues that the state statute limits towns to providing grandfathered status only to properties meeting the state standard of "individual and separate and non-affiliated ownership."

Even if the state statute were to apply to Lot 1, the lots did not merge because the

[2] Appellee-Applicant also argues that even if the state statute applied to Lot 1, and would have required merger, the lots did not merge because the right-of-way now held by Appellant prevents them from being used "in the ordinary manner as a single 'lot'." Wilcox v. Village of Manchester Zoning Bd. of Adjustment, 159 Vt. 193, 197 (1992). Material facts are in dispute at the present time as to whether the right-of-way presents the sort of functional barrier contemplated in Wilcox; however, today's ruling on other grounds makes it unnecessary to address those disputed facts in an evidentiary hearing in this case.

Norwich regulations do not contain a provision requiring merger of a conforming but undeveloped lot with a contiguous developed lot when it becomes non-conforming. Appeal of Weeks, 167 Vt. 551 (1998). Municipalities were not required by §4406(1) to include a merger provision in their regulations on existing small lots, at least not until the state statute was amended effective April 27, 1998, after Appellee-Applicant had acquired both lots.

Accordingly, based on the foregoing, Appellee-Applicant's Motion for Summary Judgment is GRANTED and Appellant's Motion for Summary Judgment is DENIED: Parcel 2 may be developed as a separate residential lot from Parcel 1. The remaining question is whether the sewage system designed and permitted for Parcel 2 will violate the performance standards of the Norwich Zoning Regulations regarding "objectionable odor." The hearing on that issue will be set by a separate notice of hearing as soon as a courtroom is available in Woodstock or White River Junction. If the parties wish to make arrangements for a hearing at the Norwich Town Hall, they should telephone the Clerk of the Court; at the present time, January 11, 24 or 25 and February 1 or 2 are available in Judge Wright's schedule.

Done at Barre, Vermont, this 3rd day of January, 2000.

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Merideth Wright
Environmental Judge