

STATE OF VERMONT

SUPERIOR COURT

ENVIRONMENTAL DIVISION
Docket No. 81-6-17 Vtec

Ledoux Zoning Permit

DECISION ON MOTION ¹

Albert R. Ledoux, who is self-represented in this matter, received a zoning permit to build a replacement home on a pre-existing lot at 17 Potter Road in Fairfax. William M. Bowman, III, represented by Jon Anderson, Esq., argues that the road used to access the lot is deficient and appeals the permit. The Town of Fairfax (the Town), represented by Edward G. Adrian, Esq., is participating in defense of the permit.

I. Procedural History

Mr. Ledoux’s lot is only accessible via Potter Road, which is not a public road.

Under the Fairfax Development Regulations as amended September 19, 2016 (the 2016 Regulations), proposed land development on a lot without frontage on a public road can only be permitted if the lot has either: (1) frontage on a town-approved private road, or (2) access by right-of-way approved by the Fairfax Development Review Board (DRB). 2016 Regulations § 2.3.C.

In an October 20, 2017 motion for summary judgment, Mr. Bowman argued that the proposed construction fails to comply with this provision and that Mr. Ledoux’s permit application should therefore be denied. The Town and Mr. Ledoux opposed the motion.

On the record presented by the parties, we found that the Town had previously approved the construction of two homes on Potter Road—one on Mr. Ledoux’s lot at 17 Potter Road in 1981, the other on Mr. Bowman’s lot at 46 Potter Road in 2012. The record indicated both lots are only accessible via Potter Road. This implied that Potter Road was either approved as a right-of-way or is a town-approved private road. We therefore denied the summary judgment motion.

¹ This Decision is issued solely to correct the date and time on which it was issued. No other revisions have been made.

Because it appeared Potter Road satisfies Regulations § 2.3.C as either an approved right-of-way or a private road, we stated that we were inclined to grant judgment in favor of Mr. Ledoux, and invited the parties to further brief this issue pursuant to Vermont Civil Rule 56(f). In addition, we noted that Question 6 (which asks “Does the project comply with the” 2016 Regulations?) is overly broad and ordered Mr. Bowman to clarify it.² The Town and Mr. Bowman filed briefs in response to our proposal to grant judgment in favor of Mr. Ledoux. Mr. Ledoux did not file a brief.

II. Discussion

a. Remaining Questions

Mr. Bowman’s original Statement of Questions includes six questions. In our summary judgment decision, we concluded that Question 6 fails to identify a specific issue to be addressed on appeal and ordered Mr. Bowman to clarify the Question. In his response, Mr. Bowman has not offered any clarification. For this reason, Question 6 is **DISMISSED** pursuant to V.R.E.C.P. 5(f) and 2(d)(2). See In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 19 (noting this Court has the power to require specificity in the Statement of Questions).

Our summary judgment decision answered Question 1 in the affirmative, and answered Question 2 in part by determining that Mr. Ledoux’s lot at 17 Potter Road does not have frontage on a Class I, II, III, or IV public road. Based on the assumption that 17 Potter Road is a pre-existing lot under 2016 Regulations § 7.A, we concluded that Mr. Ledoux’s application does not need to comply with the standards in Article 7, partly answering Question 5. As more facts are presented, we now conclude that we are unable to determine at this pre-trial stage whether the application must comply with the Article 7 standards.

The remaining questions are as follows:

Question 2: Whether 17 Potter Road has frontage on a town-approved private road as required by 2016 Regulations § 2.3.c.1.

² While we cited the language of Question 6 in our summary judgment decision, we erroneously referred to it as Question 5.

The Court initially set a February 5, 2018 deadline for Mr. Bowman to clarify Question 6, and for the parties to respond to our decision. Attorney Anderson filed a stipulated motion to extend both deadlines from February 5 to March 20, 2018. At a subsequent status conference, Attorney Anderson clarified that he meant to request a new deadline of February 20, 2018. We subsequently granted the extension.

Question 3: Whether access to 17 Potter Road has been approved by the DRB as required by 2016 Regulations § 2.3.c.2.

Question 4: Whether the proposed access is a private road or driveway.

Question 5: Whether the proposed access complies with standards in 2016 Regulations §§ 2.3.c.2 and 7.6, in particular 7.6.a.1.c.

b. Judgment Pursuant to Rule 56

In his response to our summary judgment decision, Mr. Bowman introduces new material facts via a second affidavit.

In the affidavit, Mr. Bowman states that in 1981, what is now 17 Potter Road was part of a larger lot that had frontage on two public roads, including Sam Webb Road.³ Mr. Bowman argues that because the lot fronted on Sam Webb Road in 1981, the Town's approval of the permit application at that time did not consider the status of Potter Road and did not have the effect of designating Potter Road as a town-approved private road.

With these additional facts, it is unclear when 17 Potter Road as it exists today was created. It is also unclear when the Article 7 DRB approval process was put into effect. We are therefore unable to determine whether 17 Potter Road qualifies as a pre-existing lot under 2016 Regulations § 7.A.

Mr. Bowman also contends that the Town's position regarding Potter Road has been inconsistent.

First, he notes that when another lot on Potter Road was subdivided in 2005, the Zoning Administrator did not require the owner to obtain a subdivision permit or to improve Potter Road, in contravention to the zoning regulations then in effect (interim subdivision regulations effective September 22, 2004). Although the lots are accessible only via Potter Road, the Town did not condition development of the lots on improving Potter Road.

Second, the affidavit states that in 2011 Mr. Bowman applied to subdivide a lot with frontage on Sam Webb Road and Potter Road into two new lots, including one which is accessible only via Potter Road. The DRB approved the application with a condition that before a certificate

³ A 1981 zoning permit application, which Mr. Bowman alleges is for the mobile home built on what is now 17 Potter Road, is attached to the affidavit. The permit application states that the home will be built on a lot situated on Sam Webb Road.

of occupancy can be issued for the lot accessible via Potter Road, the road must be upgraded to meet standards set out in the August 15, 2011 Zoning Regulations § 7.6. In other words, unlike in 2005, the Town conditioned development on improving Potter Road.

Third, the affidavit states that whether Potter Road is an acceptable access never came up when he applied for a permit to build his home at 46 Potter Road in 2012. Again, although the lot is accessible only via Potter Road, the Town did not condition development of the lot on improving Potter Road.

These factual allegations call into question how a road becomes a town-approved private road, how the DRB approval process for right-of-way access approval is carried out, and whether 2016 Regulations § 2.3.C and 7.A have been interpreted and applied in a consistent manner. See In re Korbet, 2005 VT 7, ¶ 10, 178 Vt. 459.

While we, and the Town, have suggested plausible ways a road may become town-approved, we are unable to determine at this pre-trial stage, based on the 2016 Regulations and facts before us, whether one or more of these satisfy the 2016 Regulation requirements regarding town-approved private roads.⁴

Another issue raised by the parties' positions is whether the zoning provisions at issue are sufficiently clear to be enforceable. While zoning regulations are presumed to be constitutional, a regulation "that fails to provide sufficient standards to adequately guide applicants and decisionmakers violates property owners' due process rights." In re LaBerge NOV, 2016 VT 99, ¶¶ 18–19, 203 Vt. 98 (citations omitted).⁵ 2016 Regulation § 2.3.c.1 allows land development on lots with frontage on town-approved private roads. The regulations are entirely silent, however, on the process for such approval, and appear to lack any guidance on what qualifies as a town-

⁴ We have suggested that allowing the 2005 subdivision on Potter Road and permitting Mr. Bowman's construction in 2012 acted to implicitly approve Potter Road as a town-approved private road or right-of-way. We also noted in our summary judgment decision that town approval of private roads may be related to 2016 Regulations § 7.B.2, which states that "[a]n engineering certificate is required to certify satisfactory completion of all private roads." The Town suggests in its response to that decision that a road is a town-approved road specifically for the construction of single-household dwellings on pre-existing lots because such lots "shall be presumed to have Town permission" under § 7.A. In other words, the town approval is effected via § 7.A.

⁵ Although this issue is not expressly raised in the Statement of Questions, the Supreme Court in LaBerge NOV held that when a Statement of Questions raises compliance with a specific zoning regulation, "the meaning and reach" of that regulation is intrinsic and can be addressed by the parties. 2016 VT 99, ¶ 15.

approved private road. In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶ 14, 185 Vt. 201 (concluding a zoning regulation violates landowners’ due process rights where it “provides no guidance as to what may be fairly expected from landowners”). The allegations raised by Mr. Bowman also suggest the Town may have applied the provision inconsistently and arbitrarily, which also suggests that the regulation may be unenforceable. In re Beliveau NOV, 2013 VT 41, ¶ 15, 194 Vt. 1 (“[R]egulations are unconstitutionally vague when they either fail to provide sufficient notice for ordinary people to understand what conduct is prohibited, or allow arbitrary and discriminatory enforcement.”).

III. Conclusion

Because it is unclear whether Mr. Ledoux’s proposal complies with 2016 Regulations § 2.3 and Article 7, or whether it only needs to comply with parts of these regulations, we decline to grant judgment to the Town or Mr. Ledoux on the remaining Questions.

This matter shall proceed to trial. Please see the enclosed notice establishing a status conference. Parties are directed to be prepared at this conference to discuss any tasks necessary to be trial ready and provide a date by which they will be trial ready.

Electronically signed on March 09, 2018 at 01:57 PM pursuant to V.R.E.F. 7(d).



Thomas G. Walsh, Judge
Superior Court, Environmental Division