

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-147

SEPTEMBER TERM, 2002

	} APPEALED FROM:
	}
	} Chittenden Superior Court
In re Judge Development Corporation	}
	} DOCKET NO. S1022-98 CnC
	}
	} Trial Judge: David A. Jenkins
	}
	}

In the above-entitled cause, the Clerk will enter:

Plaintiff Judge Development Corporation appeals the superior court's decision granting defendant State of Vermont's motion for summary judgment with respect to Judge's declaratory judgment action. Because Judge seeks an advisory opinion on issues that are not yet ripe, we dismiss the appeal.

After Judge purchased property at Tafts Corners in Williston in 1984, the Agency of Natural Resources notified the corporation that the site contained petroleum contamination. Judge made some attempts to address the problem, but in 1990 the Agency notified Judge that the site required additional remedial work. In 1994, the Agency reimbursed Judge approximately \$30,000 from the Petroleum Cleanup Fund pursuant to 10 V.S.A. § 1941. Later that year, however, the Agency notified Judge that it was not eligible for the funds after all because the costs incurred at the site were covered by insurance. Judge appealed that determination, and the issue was resolved in a 1995 settlement agreement in which the Agency agreed not to pursue reimbursement for the \$30,000 in cleanup costs previously paid to Judge, and Judge agreed to implement a Corrective Action Plan (CAP) to clean up the contaminated site. Under the agreement, if the plan accomplished its stated objectives, the site would be eligible for a Site Management Activity Completed (SMAC) designation. The agreement also provided that the State would " pay one-third of the implementation costs of the approved plan not to exceed \$44,000," and Judge would " pay two-thirds of the costs of the approved plan."

Judge implemented the CAP and sought a SMAC designation in 1997. The Agency denied the request because it concluded that Judge had failed to implement the plan in a manner that would enable the Agency to determine whether the CAP objectives had been met. In 1998, Judge requested additional payments from the cleanup fund in excess of \$44,000. The Agency denied that request as well based on its assessment that there had been no newly discovered contamination at the site.

Judge filed a declaratory judgment action against the State in August 1998. In count one of the complaint, Judge sought a declaration that (1) it had completed its obligations under the 1995 settlement agreement and was entitled to a SMAC designation; and (2) in the alternative, if the superior court determined that Judge was not entitled to a SMAC designation, the Agency had to reimburse Judge for all sums expended or to be expended in excess of Judge's two-thirds share of the costs. In count two, Judge sought reversal of the Agency's 1998 decision denying Judge additional reimbursement from the fund.

The superior court granted summary judgment to the State, ruling that Judge failed to adequately challenge the State's

evidence demonstrating that Judge had not satisfied the requirements of the CAP (and thus was not entitled to a SMAC designation). As for Judge's request for additional reimbursement from the cleanup fund, the court ruled that because Judge had not met its CAP obligations and was not eligible for a SMAC designation, Judge was not entitled to any additional cleanup funds. The court pointed out that Judge specifically indicated that it was seeking reimbursement costs incurred only after it satisfied its CAP obligations and became eligible for a SMAC designation. Judge filed a motion to alter or amend the decision, asking the court to indicate whether it had considered and rejected, or simply did not address, some of the arguments made by the State in support of its motion for summary judgment, including the claim that the settlement agreement resolved for all time the State's obligation to reimburse Judge from the cleanup fund. The court denied the motion to alter or amend, stating that Judge had failed to present competent evidence showing that it had fulfilled its obligations under the 1995 settlement agreement, and that Judge was not entitled to additional reimbursement because its claims were controlled by the settlement agreement, which imposed a \$44,000 cap on Judge's entitlement to reimbursement from the cleanup fund.

On appeal, Judge argues that the superior court erred by determining that the 1995 settlement agreement limited its entitlement to reimbursement for the cleanup fund to \$44,000, and by denying Judge's motion to alter or amend. The State responds that the appeal should be dismissed because Judge is asking this Court for an advisory opinion rather than challenging the judgment below.

We conclude that Judge's appeal must be dismissed because Judge is not challenging the superior court's judgment with respect to its claims in the present case; rather, Judge is asking this Court, as it did the superior court in its motion to alter or amend, to give an advisory opinion on whether the 1995 settlement agreement would prevent it from seeking additional reimbursement from the cleanup fund in the event that Judge satisfied its CAP obligations and then incurred additional expenses after becoming eligible for a SMAC designation. Judge's request is premature. See Wood v. Wood, 135 Vt. 119, 120-21 (1977) (constraint prohibiting courts from rendering advisory opinions extends to declaratory judgment actions; issue to be resolved " must not be premature, in that it must be a necessary part of the final disposition of the case to which it pertains" ); Robtoy v. City of St. Albans, 132 Vt. 503, 504 (1974) (declaratory judgment functions " to provide a declaration of rights, status, and other legal relations of parties to actual or justiciable controversy" ; claimed results or consequences may not be " based upon fear or anticipation" ); Lace v. Univ. of Vt., 131 Vt. 170, 175 (1973) (without justiciable controversy, " declaratory judgment can provide no more than an advisory opinion, which our State judiciary does not have the constitutional power to render" ).

As the trial court pointed out, Judge specifically indicated that it was " not seeking reimbursement for any expenses incurred by it in implementing and carrying out the approved plan," but rather sought only " reimbursement for costs incurred after it was entitled to a SMAC." The court determined, however, that Judge was not entitled to a SMAC designation. Thus, if we were to grant the relief sought by Judge, it would have no effect on the superior court's judgment or the claims made by Judge in the present controversy. If and when the events that concern Judge come to pass, and the parties cannot resolve the issue at that time, then, and only then, may the question be litigated. Neither the superior court nor this Court may provide an advisory opinion on that potential issue. There was no abuse of discretion by the trial court in its denial of Judge's motion to alter or amend the decision.

Appeal dismissed.

BY THE COURT:

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice

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Ernest W. Gibson III, Associate Justice (ret.)

Specially Assigned