

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-495

MAY TERM, 2005

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| In re Appeal of Sisters and Brothers | } | APPEALED FROM: |
| Investment Group, LLP | } | |
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| | } | Environmental Court |
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| | } | DOCKET NO. 281-12-02 Vtec |
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| | } | Trial Judge: Merideth Wright |

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

This is an appeal from an environmental court decision denying approval for a proposed convenience store with gasoline pumps in the Town of Colchester. The appellant, Sisters and Brothers Investment Group, LLP (SBI), contends the environmental court erred by concluding that (1) a convenience store with gasoline sales is not a permitted use in Colchester’s GD-1 zoning district, and (2) the proposed project does not meet the applicable conditional use criteria. We reverse, concluding that the environmental court misconstrued the zoning regulations on permitted uses in GD-1 zoning district.

In 2002, SBI sought approval from the Town of Colchester for a convenience store with gasoline pumps on property SBI owns along College Parkway. The property is located in the GD-1 zoning district. The zoning regulations in effect at the time describe the GD-1 district as providing for “residential and compatible commercial and limited light manufacturing activities in an environment featuring convenience of required facilities and essential services.”^[1] Town of Colchester, Vt., Zoning Regulations § 1200 (Sept. 9, 1997). After the town denied the application, SBI appealed to the environmental court. The environmental court also denied SBI’s application. The court held that SBI’s proposed use was not permitted under the zoning regulations. After a contested evidentiary hearing on the issue, the court concluded that the project did not qualify for conditional use approval under established criteria. The court denied the permit application, and SBI appealed to this Court.

On appeal, SBI argues that its project is permitted under the zoning regulations because even if the regulations are ambiguous the ambiguity must be resolved in SBI’s favor; and, in any event, the project qualifies for conditional use approval. We do not address the last argument because we find the first one controlling.

Like the environmental court, this Court interprets zoning ordinances according to the rules of statutory construction. In re Bennington Sch., Inc., 2004 VT 6, ¶ 12, 176 Vt. 584 (mem.). We apply the plain meaning of the ordinance’s text, unless that text is uncertain. In re Miserocchi, 170 Vt. 320, 324 (2000). In that event, we must resolve the uncertainty in favor of the property owner because zoning is in derogation of common law property rights. Id.; accord Bennington Sch., 2004 VT 6, ¶ 12. The regulations at the center of this dispute are, at best, uncertain. Although the environmental court acknowledged the ambiguity in the regulations,^[2] it construed them against SBI and thereby committed clear error. See Bennington Sch., 2004 VT 6, ¶ 12 (explaining that environmental court’s interpretation of zoning ordinance is reversible if clearly erroneous).

Section 1201 of the Colchester ordinance provides that the uses permitted in the GD-1 district are listed in a “Table of Permissible Uses.” Town of Colchester, Vt., Zoning Regulations § 1201 (Sept. 9, 1997). The Table of Permissible Uses identifies both permissible and conditional uses in certain of the Town’s various zoning districts. The Table also denotes whether any listed use is permissible, but only with conditions. Any uses not expressly permitted in the Table are prohibited, except certain conditional uses. *Id.*

The text of the Table therefore controls whether a use is permitted or not. The Table lists “convenience store” and “convenience store without gas pumps” as permissible uses in two sets of different, but overlapping districts. *Id.* §§ 2.111 (convenience store), 2.112 (convenience store without gas pumps). A “convenience store” is a permitted use in the Commercial and GD-1 districts, but no others. *Id.* § 2.111. In contrast, a “convenience store without gas pumps” is permissible in the Commercial, GD-1, GD-3, and GD-4C zoning districts. ^[3] *Id.* § 2.112. Although § 101 of the ordinance defines the term “convenience store” to include the sale of “household supplies,” the definition neither expressly includes nor excludes gasoline sales. *Id.* § 101.

Rather than holding that a convenience store as described in § 2.111 must mean one with gasoline pumps, the environmental court turned to a different section of the ordinance, the provision for conditional uses in the GD-1 district. The court reasoned that conditional uses in the GD-1 district include “other commercial uses” not listed as permitted uses in the Table. The table also provides that gasoline sales are a permitted use in the Commercial district, but not in the GD-1 district. Therefore, the court concluded, a convenience store must obtain conditional use approval if it wants to sell gasoline in the GD-1 district because the sale of gasoline is an “other commercial use” requiring conditional use approval in the GD-1 zone.

We conclude that the environmental court’s analysis conflicts with the plain meaning of the ordinance. Pursuant to § 1201, the Table governs whether or not a use is permitted in any particular zoning district. The Table provides two categories of convenience stores, a “convenience store” in § 2.111 and one “without gas pumps” in § 2.112. By modifying “convenience store” with the words “without gas pumps” in § 2.112, the only rational inference one may draw is that a § 2.111 “convenience store” is a store that has gas pumps. That inference is further supported by the different zones in which “convenience stores” and “convenience stores without gas pumps” are listed as permitted uses. A “convenience store”—that sells gas—is limited to the GD-1 and Commercial districts, whereas a “convenience store without gas pumps” is allowed in two additional zoning districts, namely GD-3 and GD-4C.

The only rational purpose for listing two categories of convenience stores in the Table of Permissible Uses is to draw a distinction between the permissible uses in the corresponding zoning districts. If “convenience stores” and “convenience stores without gas pumps” were intended to describe the same use, as the environmental court concluded, then the Table of Permissible Uses would show them as permitted uses in the same zoning districts. It does not. A “convenience store without gas pumps” is allowed in more zones than a “convenience store.”

The Town argues that the reason for the two categories is logical and rational. It asserts that when the Town created the GD-3 and GD-4C districts, it wanted to emphasize that gas sales would not be permitted, even in combination with a convenience store. The Town explains that it left § 2.111 unchanged when it added § 2.112 for emphasis only. A “convenience store” remains defined by § 101, according to the Town, and that definition does not include gas sales.

If this were a matter of policy, we might be persuaded by the Town’s claim. It is however a matter of ordinance construction where the language of the ordinance is clear. In context, a convenience store as described in § 2.111 can only mean one with gas pumps, and the language allows such a store in the GD-1 district. Section 1201 makes the provisions of the Table of Permitted Uses the controlling list of permitted uses. The text of the Table contains a list of zones in which a “convenience store” is permitted and a different list where a “convenience store without gas pumps” is allowed. In this context, a “convenience store” can be understood to be one where gas is sold. To the extent that the § 101 definition of convenience store does not preclude gas sales, adding “convenience store without gas pumps” to the Table of Permissible Uses could have been intended to clarify that “convenience stores” generally have gas pumps, and

as such, they are a permitted use in fewer zones than those without pumps.

We note that the Town has now rewritten the definition of convenience store consistent with the policy it presented to the environmental court. The definition now clarifies when gas sales are permitted with convenience stores. See Town of Colchester, Vt., Zoning Regulations, § 12.02 (Nov. 30, 2004) (providing in definition for convenience stores that they “may include gasoline sales as provided in Appendix Table A-1, the table of permissible uses, herein”). This case is governed by the regulations existing at the time, however, and the Table of Permissible Uses allows SBI to put its Colchester property to use as a convenience store with gasoline pumps.

Reversed and remanded for entry of judgment for Sisters and Brothers Investment Group, LLP.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

^[1] The regulations were amended effective November 30, 2004. The updated regulations now describe the GD-1 district as follows: “To provide for residential and compatible commercial featuring convenience of required facilities and essential services in the Colchester Village and Warner’s Corners neighborhoods.” Town of Colchester, Vt., Zoning Regulations § 4.01 (Nov. 30, 2004).

^[2] We observe that the environmental court agreed with our view of the regulations. In a footnote to its decision, the court urged the Town to consider rewriting the ordinance for clarity. The Town has now adopted a new ordinance, which became effective in November 2004.

^[3] The use is permissible in GD-4C area with conditions.