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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-403

FEBRUARY TERM, 2006

232511 Investments, Ltd. d/b/a Stowe Highlands	}	APPEALED FROM:
v.	}	Lamoille Superior Court
Town of Stowe Development Review Board	}	DOCKET NO. 75-4-04 Lecv

Trial Judge: Howard E. VanBenthuysen

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

Appellant, an applicant before the Stowe Development Review Board, appeals the trial court=s decision that an opinion letter written by the DRB=s attorney and providing legal advice to the DRB was protected from disclosure by the attorney-client privilege. We affirm.

Applicant seeks certain zoning permits from the DRB. In connection with its consideration of the application, the DRB requested an opinion letter from its attorney. Applicant asked that the letter be disclosed, and sued for disclosure when the DRB refused. In its initial decision, the trial court concluded that the letter was protected from disclosure because it was subject to the attorney-client privilege. The trial court reached this conclusion without reviewing the letter in camera and without any evidentiary support for the claim of privilege. On the first appeal to this Court, we reversed and remanded for the trial court to review the letter in camera and determine whether the letter contained legal advice. See 232511 Investments Ltd. v. Town of Stowe Development Review Board, 2005 VT 59, & 3. On remand, the trial court reviewed the letter in camera, found that it did contain legal advice, and again entered summary judgment in favor of the DRB on the disclosure issue.

On appeal, applicant argues that (1) the DRB failed to carry its burden of demonstrating that the letter was intended to be confidential and therefore subject to the attorney-client privilege, and (2) the DRB waived any privilege because the DRB did not certify its claim of privilege in writing pursuant to 1 V.S.A. ' 318(a)(2).

We review a grant of summary judgment applying the same standard as the trial court: summary judgment is warranted where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Noble v. Kalanges, 2005 VT 101, & 16.

In the context of public agency proceedings such as the one at issue here, 1 V.S.A. ' 317(c)(4) exempts from the general rule of disclosure Arecords which, if made public . . . , would cause the custodian to violate any statutory or common law privilege.@ The attorney-client privilege falls within this exception. As codified in Vermont Rule of Evidence 502(b), A[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made

for the purpose of facilitating the rendition of professional legal services to the client . . . between himself or his representative and his lawyer or his lawyer=s representative . . . . @ The Rule defines the term Aclient@ broadly, such that a public agency, including the DRB, would fall within the definition. See V.R.E. 502(a)(1); see also Reporter=s Notes, V.R.E. 502 (stating that the definition of Aclient@ under the Rule Aincludes every conceivable public or private individual or entity that might seek or obtain legal services@).

Accordingly, a document privileged pursuant to V.R.E. 502 is expressly exempt from public access under 1 V.S.A. ' 317(c)(4). Applicant argues that the privilege does not apply to the opinion letter at issue here because there is no evidence that the content of the letter was confidential or was intended to be confidential. This argument fails in light of the trial court=s findings that the letter contained legal opinion and advice to a client, the DRB, and the DRB=s publicly expressed decision not to disclose that advice. The decision to disclose, or withhold, an attorney=s opinion and advice vests entirely with the client. V.R.E. 502(b).

Applicant nonetheless argues that any assumption of intended confidentiality is destroyed because the DRB had previously disclosed opinion letters in relation to other matters. The trial court properly rejected this argument as well. Applicant is correct that the attorney-client privilege may be waived by disclosure to third parties, and that such waiver extends to all other communications on the same subject matter, see, e.g., Steinfeld v. Dworkin, 147 Vt. 341, 343 (1986) (holding that Aa party attacking his own attorney=s authority to settle impliedly waives the privilege as to the very matter he puts in issue@), but this body of law in no way supports a conclusion that disclosure of a particular type of communication (i.e., an opinion letter) related to one matter can waive the attorney-client privilege with respect to the same type of communication in a wholly different matter. Indeed, applicant cites no authority supporting such a proposition.

Finally, applicant argues that 1 V.S.A. ' 318(a)(2) requires the DRB to provide written notice of its intention to assert a privilege and resist disclosure of a record. While this is correct, the trial court properly concluded that the remedy for the DRB=s failure to provide such notice is not a default waiver of the privilege. Rather, any party aggrieved by an alleged violation of the statute may pursue a review process to determine whether the record was properly withheld. See 1 V.S.A. ' 319(a). In any event, in the instant case, applicant received actual notice of the DRB=s position so that the matter could be fully litigated. Therefore, no prejudice resulted from the lack of official notice under ' 318(a)(2).

Applicant has presented no basis for finding error in the trial court=s ruling.
Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice