

ENC 1999-070

In re Potter

February 9, 1999

STATE OF VERMONT ENVIRONMENTAL COURT

Docket No: 170-9-98 Vtec

In re: Appeal of Rodney Potter and Lisa Jones (FN1)

Decision and Order on Cross-Motions for Summary Judgment

Appellants appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Fairfield denying their application for a conditional use permit. Appellants are represented by Liam L. Murphy, Esq. and Lisa B. Shelkrot, Esq.; the Town is represented by Michael S. Gawne, Esq. The parties filed cross-motions for partial summary judgment (FN2) on Questions 3 and 4 of the [second] Amended Statement of Questions filed January 12, 1999. At page 3 of the Town's Memorandum filed on January 25, 1999, the Town noted that the Town Plan does not limit this particular development, and that it would not brief the issue of the incorporation by reference of the Town Plan. Accordingly, Appellants filed a Third Amended Statement of Questions on February 8, 1999. The Court will address the issues in the motions for summary judgment as limited by the Third Amended Statement of Questions.

Appellants own a parcel of land on Sweet Hollow Road in the Agricultural zoning district. A residence is a conditional use in that district. Appellants' application for construction of a single family residence with associated wastewater disposal system on the parcel was denied on the basis of "excessive slope." The decision stated that the house site is at a 24% slope and [the parcel] "is at a 34% slope above the house." It denied the application, in pertinent part, because the state Environmental Protection Rules governing the design of wastewater disposal systems state that "[t]he maximum ground slope for any disposal system shall be 20%."

The materials supplied to the Court in association with the motions for summary judgment do not reveal the location or slope of the proposed wastewater disposal system or replacement area, nor whether modification of the wastewater disposal site was proposed to reduce the ground slope below a slope of 20% when installed, nor whether any element of the state Environmental Protection Rules allows such site modification.

In §30(a)(FN3) of its Zoning Bylaws and Subdivision Regulations, the Town purported to incorporate by reference the design standards for wastewater disposal systems found in the state "Environmental Protection Regulations." Appellants argue that the attempted incorporation exceeded the Town's authority and therefore is not valid, effective or enforceable.

The Zoning Bylaws and Subdivision Regulations were adopted by the Town on March 5, 1996. The version of the state Environmental Protection Rules (EPRs) in effect as of that time contained a provision, in Chapter 1, §7.07A(3) "Site and Terrain Investigation," stating that:

A site and terrain investigation shall be conducted for the purpose of sizing the area to meet minimum isolation distances between various system components, as listed in Appendix 7-D, and evaluating the terrain to determine surface drainage problems and suitability of ground slope. The site

and terrain investigation shall demonstrate that sufficient area of suitable soils exist on favorable terrain for the purpose of accommodating both primary and replacement disposal fields. The maximum ground slope for any disposal system shall be 20%.

The identical language is contained in the version of the EPRs as amended in 1996 (after the adoption of the Town's Zoning Bylaws and Subdivision Regulations) and in effect at the time of Appellants' application.

As discussed in *McLaughry v. Town of Norwich*, 140 Vt. 49, 52 (1981), only if the incorporated material is not on record (or is itself invalid) at the time of the attempted incorporation, should the incorporation by reference be invalidated. A zoning ordinance may incorporate by reference any document then in existence by publication or adoption as a public record.

What is prohibited as an illegal delegation of municipal legislative authority is the purported adoption of future changes to a document. It does not matter whether those future changes to the document are made by a private organization, such as the Institute of Transportation Engineers, or by a governmental entity such as the Vermont Agency of Natural Resources or the federal Environmental Protection Agency. The infirmity is a constitutional one. That is, an adoption of future changes in a document published by another entity is considered to delegate impermissibly to the other entity the municipality's authority to adopt its own zoning ordinance.

Thus, in the present case, the only version of the EPRs which was capable of being incorporated by reference was the version in existence as of the warning for the March 5, 1996 vote which adopted the zoning ordinance. That version meets the standards for material to be incorporated by reference established in the *McLaughry* decision. On the other hand, any attempt by the Town to incorporate future changes in the EPRs, by using the word "current," was not valid, effective or enforceable. Accordingly, the Town's Motion for Summary Judgment is GRANTED as to the incorporation by reference of the version of the EPRs in effect as of the date of the warning for the March 5, 1996 vote; while Appellants' Motion for Summary Judgment is GRANTED as to the incorporation by reference of any changes made in the EPRs since that time.

This decision, however, does not make a hearing unnecessary on Question 1 of the Third Amended Statement of Questions, that is, whether the proposed wastewater disposal system complies with the earlier version of the EPRs regarding slope. The materials supplied to the Court in association with the motions for summary judgment do not provide undisputed facts regarding the location or slope of the proposed wastewater disposal system or replacement area, whether modification of the wastewater disposal site was proposed to reduce the ground slope below a slope of 20% when installed, or whether the EPRs allow such site modification, or under what circumstances. Therefore we must proceed to the hearing on the merits now scheduled for the morning of February 17, 1999, at Franklin Superior Court. A pretrial telephone conference will be held on Friday, February 12, 1999 at 4:00 p.m. to discuss the scope of and the parties' readiness for that hearing.

Done at Barre, Vermont, this 9th day of February, 1999.

Merideth Wright Environmental Judge

FN1. Ms. Jones is a party to this appeal as both she and Mr. Potter filed the original notice of appeal. Unaccountably, her name has been omitted from the caption and some documents as filed by both parties.

FN2. Exhibit A to Appellants' motion appears to be an original document; Appellants should arrange to substitute a copy and retrieve the original before the conclusion of this case.

FN3. Wastewater disposal systems shall be constructed in accordance with the design standards in the current version of the Environmental Protection Regulations which are hereby adopted by reference and declared to be a part of this by-law, and [in accordance with] the Fairfield Sewer Ordinance.

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