

HIGHWAY ROW AREA CANNOT BE INCLUDED IN LOT SIZE AND DIMENSION CALCULATIONS

In the zoning realm, the question occasionally arises as to whether land subject to a highway right-of-way can be considered when determining if a parcel meets a minimum lot size requirement or qualifies as an existing small lot. This issue was recently addressed by the Vermont Supreme Court in an entry order, *In re: Appeal of Bailey*, 2005 VT 38 (2005).

Up for review was the Arlington zoning bylaw. The bylaw provided that any lot in individual and separate non-affiliated ownership from surrounding properties in existence on the effective date of the bylaw could be developed for the purposes permitted in the district in which it was located, even though it did not conform to minimum lot size requirements. Such development was allowed only if the lot was not less than one-eighth acre in area with a minimum width or depth dimension of 40 feet. This provision was a requirement of, and identical to, the former 24 V.S.A. § 4406(1).

Relying on this provision, an applicant sought a permit to construct a commercial building on a parcel of land on Route 7A. As deeded, the parcel had dimensions of 120 feet by 67½ feet. However, the 67½ foot depth dimension included approximately 33½ feet over which the State held an easement for Route 7A. Arlington's Zoning Board of Adjustment concluded that the lot could be developed as an existing small lot. A neighbor appealed, arguing that the portion of the lot subject to the highway easement could not be included in the dimension and size calculations.

The Environmental Court, siding with the applicant, concluded that the parcel could be developed as an existing small lot. It based its conclusion on an earlier case in which the Supreme Court had held that a lot, as the term was used in Castleton's zoning bylaw and the State's zoning statute, included land under Neshobe Brook. See *Town of Castleton v. Fucci*, 139 Vt. 598 (1981). The Environmental Court reasoned that, like the land under Neshobe Brook, the land under Route 7A could be used in determining whether the Arlington parcel met the minimum dimension and size requirements for an existing small lot.

The Supreme Court reversed, reasoning that while land underlying a brook or stream might be developed (though, perhaps, with some difficulty), land underlying a public highway, "which is already developed and for a use incompatible with other uses by the owner," could not. Thus, concluded the Court, it was improper for the Arlington Board and the Environmental Court to consider the land under Route 7A in determining whether the parcel qualified as an existing small lot.

While the Court in *Bailey* was interpreting the pre-2004 version of Chapter 117, municipalities seeking to encourage development of existing small lots should give this issue careful consideration. Though generally encouraging development of existing small lots, the 2004 revisions to Chapter 117 allow municipalities to prohibit development of existing small lots less than one-eighth acre or having a width or depth dimension less than 40 feet. 24 V.S.A. § 4412(2)(A) (i) and (ii). Given that a typical municipal highway right-of-way extends 24 feet, nine inches from the center of the existing traveled way, and that rights-of-way for state highways may be even larger, some existing small lots may not be developable if the municipality chooses to include this prohibition in its bylaw.

- Jim Barlow, Attorney, VLCT Municipal Assistance Center

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