

FINALITY OF ZONING DECISIONS

A decision of the Vermont Supreme Court will require the Town of Richmond to consider new evidence concerning the location of a floodplain. In *re Appeal of Isaac Cowan*, 2005 VT 126. The facts of the case are rather complicated; the important specifics are that Cowan applied for a zoning permit in 2000 to construct a retaining wall around his property, fill in behind the wall, and regrade the slope.

The zoning administrator approved the application, based in part on a determination that the wall was located outside of the floodplain, pursuant to the most current Flood Insurance Rate Maps (FIRMs). Without meeting all of the permit conditions, or appealing them, Cowan constructed the wall in February 2001. The zoning administrator sent Cowan a notice of violation indicating that the retaining wall was not constructed in compliance with the permit, and that it had been constructed within the flood hazard overlay district. Cowan never appealed this notice of violation. The Town eventually pursued an enforcement action in Environmental Court, which ruled in favor of the Town, but did not grant the injunctive relief the Town requested.

In January 2004, Cowan submitted a request to the zoning administrator (ZA) to revisit the determination of the floodplain elevation of his property based on engineering studies he had commissioned. The ZA denied the request, and the development review board (DRB) upheld this decision.

The case eventually made its way to the Supreme Court, which looked carefully at the Richmond Zoning Regulations. There are two avenues in the Regulations by which the Town can determine where the floodplain is in relation to a particular parcel. The first provision states, "The Zoning Administrator shall determine whether a parcel falls within the Flood Hazard District by referring to the most recent FIRM." Richmond Zoning Regulations § 6.8.3. The second method is by surveying the individual parcel, and the regulations acknowledge that individual surveying may show that land previously considered to be part of the floodplain based on the FIRM may not actually be a part of the floodplain. ("Survey maps may be inaccurate and surveying of an individual parcel may reveal additional land not within the floodplain.") Richmond Zoning Regulations at § 6.8.2.

The Court's holding rested on the fact that the regulations permit a separate determination based on surveys of individual parcels, and there is no time limit on when those need to be accomplished. The Town argued unsuccessfully that Cowan should not have been allowed to have the Supreme Court review his appeal, in that there was already a final determination that he was in violation of his zoning permit. This, according to the Town, was an impermissible collateral attack on the validity of an earlier enforcement decision. The Court rejected that argument on the basis that the enforcement action did not preclude Cowan from seeking a separate determination about the elevation of his property as it relates to the floodplain.

The lesson we can take from this case is that the legal doctrine of finality has its limits. The Town here relied on the landowner's failure to appeal the ZA's notice of violation, on the belief that the failure to appeal that notice made it "final." The Town was correct in this respect; therefore, the landowner was bound by the enforcement letter and would have to suffer the consequences of any court action with respect to the letter. However, the landowner's failure to appeal the letter did not preclude him from seeking

an independent survey to verify the location of the floodplain. Therefore, the Town should have reevaluated his request, particularly in light of the bylaw provision that expressly permitted such a survey, and envisioned the Town taking action on it.

- Brian Monaghan, Attorney, VLCT Municipal Assistance Center

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