

Enforcement Action Must Precede Environmental Court Penalties or Injunctive Relief

As evidenced by the lively discussions led by Judges Durkin and Wright at the VLCT Planning and Zoning Forum last November, enforcement is a hot topic in Vermont zoning. In a December opinion, the Environmental Court addressed enforcement and reminded Vermont municipalities that the Court only has the authority to issue injunctive relief and award monetary penalties in the context of an original enforcement action. It cannot do so when acting in its appellate capacity. *Smith NOV Appeal*, 117-05-06 Vtec (December 18, 2006).

Appellant Dennis Smith applied for site plan approval to move a construction business to his property in Wallingford. The Town's planning commission held a hearing, determined that the application was incomplete, and notified Mr. Smith that he would need to submit a more thorough application. On February 7, 2006, Mr. Smith submitted a second application, again seeking site plan approval to move the construction business. The planning commission held a hearing on the second application and issued a written decision, finding that the application was again incomplete. As a consequence of this determination, the planning commission denied Mr. Smith's second application.

On March 29, 2006, the zoning administrator issued a notice of violation (NOV) to Mr. Smith, citing two alleged violations. The first referenced violation was for changing the use of his property to a contractor's yard without first obtaining a change of use permit, as required by the Wallingford zoning regulations. The second referenced violation was for filling in an area that is considered a floodway, in violation of the town's flood plain ordinance. Mr. Smith filed an appeal of the NOV with the Wallingford zoning board of adjustment (ZBA). The ZBA held a hearing on the appeal but Mr. Smith failed to appear. The ZBA then issued a written decision "to vacate . . . and dismiss" his appeal.

Mr. Smith appealed both the planning commission decision denying site plan approval and the ZBA decision dismissing and vacating his appeal of the NOV to the Environmental Court. In the ZBA appeal, the Town filed a motion seeking injunctive relief in the form of an order requiring (1) immediate cessation of all business activities related to Mr. Smith's construction business; (2) immediate removal of any and all vehicles, equipment, machinery and property from the Route 7 parcel except that connected with an existing auto sales business on the site; and (3) monetary penalties and payment of reasonable legal fees in the event of continuing violations of the order.

The Environmental Court denied all three requests, noting that the only issues preserved in the Court's review in either of the pending appeals were whether the site plan application should have been approved and whether the NOV should have been issued. In its motion, the Town was requesting injunctive relief under V.R.E.C.P. 3 and 24 V.S.A. § 4452. However, such relief is beyond the jurisdictional authority conferred upon the Court by the pending appeals. Because the Town had not yet commenced "an action" against Mr. Smith pursuant to 24 V.S.A. § 4452 and V.R.E.C.P. 3, the Court had no jurisdiction to order the relief the Town sought. The question of whether the Town was entitled to injunctive relief or monetary damages was not the subject of either pending appeal and, therefore, outside the scope of the jurisdiction the Court had in the pending appeals.

This case serves as a reminder to towns (and their attorneys) that if they want to obtain injunctive relief or penalties from the Environmental Court to enforce their zoning bylaws, they must first take the next step in enforcement proceedings and bring an “action” against the perceived violator to invoke the Court’s original jurisdiction under V.R.E.C.P 5 and 24 V.S.A. § 4452. This is true even if the perceived violator has appealed the zoning administrator’s notice of violation to the town’s ZBA or development review board. Simply requesting injunctive relief or monetary penalties from the Court in the context of an appeal will not be sufficient to get the injunction or monetary award necessary to make enforcement activities stick.

- Jim Barlow, Attorney, VLCT Municipal Assistance Center

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