

VERMONT SUPREME COURT: PROCEDURAL ERROR LEAVES EARLIER VERSION OF ORDINANCE IN EFFECT

A recent Vermont Supreme Court case provides pointers on adopting ordinances. *Richards v. Nowicki and Town of Norwich*, Vt. No. 1999-406 (March 30, 2001).

In 1973 the Town of Norwich adopted an on-site septic ordinance that established minimum standards for septic systems. The ordinance also contained Section VII which allowed special cases to deviate from the standard if the applicant could show that the public health and safety would not be compromised.

In 1984 state law governing on-site septic ordinances changed, setting new statewide minimum standards for on-site systems and saying that no ordinance could take effect until it was approved by the Department of Environmental Conservation (DEC) as being at least as strict as the state's minimum standards. 24 V.S.A. § 3633. That same statute grandfathered on-site septic ordinances that had been adopted prior to 1984.

In 1994 the Town amended its 1973 ordinance to effect new, detailed specifications for septic systems. It left Section VII intact, allowing for special cases. The Town believed that if it only amended the old ordinance, rather than adopting a new one, it did not need to submit the amended version to DEC for its approval.

In 1996, property owner Nowicki applied for a permit for a residential on-site septic system. Because of the size and layout of the lot, he required consideration under the "special cases" section. The permit was granted and abutting landowner Richards appealed that decision. After much legal wrangling about other issues, the case arrived before the Supreme Court to decide what version of the Town's ordinance was in effect, the 1973 one or the amended 1994 one.

By this time, both Richards and the Town agreed that the Town should have submitted the amended version of its ordinance to DEC for its blessing. But, they did not agree on what effect the failure to do so had. The Town argued that failure to have the 1994 amended version approved left the 1973 version in effect. Richards argued that the state's minimum standards for on-site systems were automatically incorporated into the amended ordinance because 24 V.S.A. § 3633(b) mandates that a local on-site ordinance must be "at least as stringent as the [state's new, 1994] minimum standards." Therefore, said Richards, the newer, stricter standards were now the standards to be applied by the Town's ordinance.

The Court based its analysis on the plain language of the statutes that reflects the Legislative intent. First it noted that the statute said that a new ordinance "shall not take effect until approved by" DEC. Therefore, the 1994 version had never gone into effect. That left the 1973 ordinance alive and well and in full force.

A second reason that the 1973 ordinance was preserved is that 24 V.S.A. § 3633(d) specifically provides that on-site septic ordinances which were properly adopted before 1984, and not replaced with an approved one, shall remain in effect until the year 2002. Again, this was the plainly stated intent of the Legislature. In addition, it is general law, said the Court, that if an amendment does not specifically repeal an earlier version of an ordinance, then an invalid amendment merely leaves the original version in effect.

There were other legal points in this case, but the lesson for municipalities here is that it is important to know what steps are required when adopting an ordinance. Here the onsite ordinance adoption required not only the steps spelled out in the general chapter on

ordinance adoption (24 V.S.A. Chapter 59), but also the approval of DEC, which is mandated by a separate statute. Admittedly, it can be tedious and time consuming to check dotted i's and crossed t's, but it is not nearly so tedious, time consuming **and expensive** as being in and out of court for several years because of a procedural error.

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