

SUPREME COURT CLARIFIES WHAT MUNICIPALITY CAN AGREE TO IN ZONING AGREEMENT

Can a property owner collect damages from a municipality when the municipality refuses to issue a zoning permit under the terms of a contractual arrangement between it and a prior owner of the property? The Vermont Supreme Court says “That depends.” *Larkin v. City of Burlington, Vt.* Entry Order No. 1999-219 (April 31 [sic], 2001)

In 1985 Northshore Partnership and Northshore Development, Inc. applied for a zoning permit, and the City of Burlington denied it. Northshore went to court and the matter was resolved in 1989 with a consent judgment (an agreement which was approved by the court) that said that a permit could be issued for no more than 60 units, would be subject to the ordinances in effect as of April 26, 1989, and would be binding on Northshore’s successors and assigns. In 1990 the City issued a permit for 38 units and the permit was later extended to 1993.

Eventually, the property fell into the hands of Chittenden Bank through foreclosure. The plaintiff in this case, Larkin, purchased it from Chittenden. Larkin received a copy of an appraisal that specifically noted there was no development permit in effect and that the status of the 1989 consent agreement was unclear. In addition, Larkin had initialed the hand-written “conveyed as is” amendment to the deed.

In 1997 Larkin applied for a permit for a 60-unit project. The Planning Commission denied it based on the current (1997) design review criteria. Larkin then appealed that decision to the Environmental Court and filed suit in Superior Court for damages and injunctive relief, claiming that the City’s refusal to honor the 1989 consent judgment violated a court order, violated his constitutional rights and was a breach of contract.

The two cases were combined in Environmental Court. This Court ruled that the terms of the 1989 consent judgment applied to the new zoning application. The matter went back to the Planning Commission, which issued a permit for two 18-unit structures under the terms of the consent judgment.

Meanwhile, back at Superior Court (to which the case had been remanded), that court ruled that Larkin was not entitled to any damages. The City was acting properly in its governmental capacity when it issued the permit and, in that capacity, it could not barter away its zoning authority. That means that it did not have the authority in 1997 to say that the 1989 bylaws would apply to that parcel ad infinitum.

Larkin appealed to the Supreme Court, which agreed with the lower court that “It is well settled that a municipality cannot contractually deprive itself of its legislative or governmental powers.” *Id.* at 3. Thus, the 1989 consent agreement, which said that any future permit application would be processed under the zoning ordinances in effect in 1989, was not valid.

However, the Court said there are situations in which land-use agreements are appropriate in order to assure stability in permitting large projects. A municipality may sign a contract saying that current regulations shall apply, but accompany that with a durational limit or with conditions that will terminate the contract. For example, adding “The current regulations shall apply for three years” or “If X, Y or Z happens this contract shall automatically terminate” might be acceptable.

A second point made by the Court was that Larkin was not one of Northshore's "successors or assigns" referred to in the consent agreement. In corporate situations "successors and assigns" normally refers to another corporation that assumes the rights and obligations of the original corporation. Here Larkin acquired only a part of the original property from the Bank after the original owner lost it through foreclosure.

In addition, the development rights permitted to Northshore were "personal rights to the developer" and there was no provision in the consent agreement that they would run with the land.

The major lesson in this case for municipalities is that they cannot give away or bargain away their governmental powers. Here the City had the authority to grant permits but it also had the authority and duty to change its bylaws in the future in order to deal effectively with new and different situations. When it traded away its ability to change the zoning bylaws to meet new situations, it illegally abrogated a responsibility.

VLCT News, May 2001