DRB MINUTES INADEQUATE
De Novo Review Required by Environmental Court

In the next case, *In Re Dunnett,* Vt. No. 98-314 (May 4, 2001), the Court discussed appeals done by de novo review versus on-the- record review. The owner of a ski shop, Kenneth Tofferi, applied to the Village of Ludlow for a conditional-use permit in order to do some renovations. Later he also applied for a variance. Both were granted and an abutter, George Dunnett, appealed to the Environmental Court. In a de novo hearing, the Environmental Court approved the conditional use but denied the variance. Both parties appealed that decision to the Supreme Court.

Tofferi pointed out that the Village Trustees had created a Development Review Board (DRB) and resolved that it should be governed by the Municipal Administrative Procedure Act (MAPA). That would entitle the DRB to expect an on-the-record review of appeals of its decisions by the Environmental Court. Therefore, Tofferi said, his case should not have been heard in a de novo proceeding.

The Supreme Court noted that 24 V.S.A. § 1205(c) of MAPA requires that "the proceeding be recorded." The DRB's practice was merely to keep minutes of its proceedings and not to audio- or videotape them. However, if minutes were sufficient, recent amendments to the statutes requiring "an adequate record" and that meetings "be recorded" would have been unnecessary because boards have always kept minutes. If minutes would suffice, any and all hearings would qualify for on-the-record review by the courts. In addition to the statutes, Vermont Rules of Civil Procedure 74 (d), which governs these appeals, says that a record shall include "a transcript of any oral proceedings," which means a verbatim record of the original hearing. Therefore, the Environmental Court acted properly in hearing the matter de novo.

Finally, the Court discussed the denial of the variance, which was based on the fact that Tofferi cannot claim that he meets the criterion of not being able to make any "reasonable use of the property." 24 V.S.A. § 4468 (a)(2). The Court pointed out that Tofferi is currently making reasonable use of it. However, the Court noted that the lot could be made better use of, and commented that "it appears that the Village's zoning regulations for the district at issue may be at odds with the goal of focusing development there." The cure for that situation, said the Court, is to reconsider the bylaws themselves and not to grant variances either piecemeal or wholesale.

Other brief points made in this case:

- how to calculate parking spaces needed per square feet of business space;
- pre-existing, non-conforming structures are just that and they cannot be forced to become conforming ; they can only be kept from becoming **more** non-conforming; and
- roof lines may be raised and reconstruction and enlargement may be allowed if they conform to the building requirements of the district.

- Libby Turner, VLCT Staff Attorney

VLCT News, June 2001