

The Vermont Supreme Court recently ruled on the authority of municipalities to adopt sewer allocation ordinances to regulate development. *Brennan Woods Limited Partnership v. Town of Williston*, Docket No. S1494-98CnC (Sept. 2001).

BACKGROUND

Sewer allocation ordinances have been used by municipalities throughout the country as a means of fostering the type of growth and development that communities envision for their cities and towns.

Numerous studies have shown that providing sewer service to an area facilitates development. As we all know there are many areas in Vermont where the soil is simply not suitable for significant on-site sewage disposal, and without adequate waste disposal the value of property is diminished.

Municipal sewer service provides an efficient, affordable means of disposing of effluent that enhances the development options for properties that are served by the system. Cognizant of this fact, municipalities often seek to regulate development by allocating sewer capacity at treatment plants to areas of town where the municipality would like growth to occur. The most obvious example of this practice is for a municipality to prioritize disposal capacity for downtown development or to allocate capacity to ensure development will be phased in over time in order to minimize the impacts of new development on the ability of a municipality to provide services such as police, fire and education.

CASE ANALYSIS

Under 24 V.S.A. § 3625 Vermont municipalities are authorized to adopt ordinances governing the allocation of sewage capacity. In *Brennan Woods*, the Town of Williston, pursuant to an sewage allocation ordinance adopted under 24 V.S.A. § 3625, attempted to regulate the number of dwelling units that the property owner could build at one time by allocating sewage for a set number of units per year. Concerned about the impact of residential development on municipal services, the town limited the developer through its sewage ordinance to nine dwellings in 1998-1999, 15 dwellings in 1999-2000, 22 dwellings in 2001-2002 and up to 22 dwellings units in each subsequent year through 2006-2007. The developer challenged the town's authority to require phasing for its project through the sewer allocation ordinance.

There is no dispute that municipalities can regulate the allocation of sewage capacity. As noted above this authority is clearly provided in 24 V.S.A. § 3625. The issue raised in *Brennan Woods* is whether or not municipalities are authorized to regulate the type and/or volume of development through sewage allocation ordinances. The Vermont Supreme Court answered this question by stating that "only where decisions are based on the load to the sewer system . . . may the sewer allocation ordinance be used to control population density and growth." *Id* at 4. Citing the lack of home rule in Vermont, the Court noted, "in construing a municipal act, we will resolve all doubts concerning a municipality's authority against the municipality." *Id* at 3. Applying this strict standard, the Court ruled that there was no authority in 24 V.S.A. § 3625 for municipalities to broadly regulate development through sewage allocation ordinances.

What does this mean? It means that municipalities cannot regulate development through sewage allocation ordinances unless the restrictions can be tied to the need to

manage the sewage system. In the Vermont Supreme Court's view, 24 V.S.A. § 3625 does not authorize municipalities to create land use or zoning type restrictions on development through sewage allocation ordinances. The Court has narrowly construed 24 V.S.A. § 3625 to allow for allocation restrictions solely as a tool to effectively manage the wastewater treatment plant.

In response to the *Brennan Woods* decision, there has already been some discussion about amending 24 V.S.A. § 3625 to broaden the authority of municipalities to utilize sewage allocation ordinances to regulate development. VLCT will keep you updated on any legislative developments that occur this session. In the meantime, municipalities seeking to regulate development for reasons other than system management through sewage allocation must enact such restrictions through zoning bylaws rather than through sewage allocation ordinances that are not part of the zoning bylaws.

ALTERNATIVES

It is extremely important to note that under 24 V.S.A. § 3625 a municipality may adopt a sewage allocation ordinance under its zoning bylaws. The Vermont Supreme Court, citing a previous decision relating to this issue, stated that "a town could use a sewer allocation ordinance to control growth generally ... if it acted under its zoning authority and the policy was adopted under the procedures required to adopt a zoning ordinance." *Id* at 4. Accordingly, municipalities may regulate development for reasons other than load management if the allocation ordinance is part of its zoning.

It is also important to note that municipalities may enact phasing requirements, independent of sewer allocation regulations, through zoning and subdivision bylaws. This means that even if you do not have a municipal wastewater treatment plant, your town could enact a zoning or subdivision bylaw that requires developments to be constructed in phases to minimize the impacts of the development on municipal services. In VLCT's opinion, there is clear authority to enact phasing requirements through subdivision and Planned Residential/Planned Unit Development regulations. It is not as clear that there is authority to include phasing requirements in zoning bylaws. However, this is still an open legal question. Call us at the VLCT Law Center if you are thinking about enacting phasing requirements and we will be happy to advise you about adopting such restrictions.

- Jon Groveman, Director, VLCT Municipal Law Center

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