COURT BACKS STATE LAW ON NONCONFORMING LOTS
More Lenient Municipal Zoning Provision is Struck Down

The Vermont Supreme Court has reiterated the rule that a municipal zoning bylaw must comply with state zoning enabling legislation in order to be valid.

In *In re Appeal of Stuart Richards*, the Court ruled that Norwich's zoning ordinance was impermissibly less stringent than the State's law authorizing municipalities to adopt zoning. The Town failed to include a required portion of the law, and instead substituted its own standard for merger of existing small lots. *In re Appeal of Stuart Richards* No. 2001-086 (Vt. September 20, 2002).

This case involves a landowner, Nowicki, who owned two adjacent parcels, A and B. Nowicki purchased both parcels in 1996, 15 years after Norwich's zoning ordinance was amended to increase the minimum lot size. After the amendment, lot A became a preexisting, non-conforming use, while lot B remained conforming, yet undeveloped. In 1997, Nowicki applied for, and was granted, a permit to renovate his home on lot A, within the existing footprint. Soon thereafter, he sought a permit to develop a residence on lot B, and that permit is the subject of this litigation.

Ordinance Inconsistent With State Law

In this case, Norwich's zoning ordinance failed to include a required provision on existing small lots. The State statute, at the time the permit in this case was sought, stated:

> *No municipality may adopt zoning regulations which do not provide for the following: (1) Existing small lots. Any lot in individual and separate and nonaffiliated ownership from surrounding properties in existence on the effective date of any zoning regulation, including an interim zoning regulation, may be developed for the purposes permitted in the district in which it is located, even though not conforming to minimum lot size requirements, if such lot is not less than one-eighth acre in area with a minimum width or depth dimension of forty feet. 24 V.S.A. § 4406 (1992).*

The Town's ordinance in effect at the time of this dispute stated: "Any lot, structure, or use which conformed to the zoning ordinance when it was established may be utilized lawfully under this ordinance with the following restrictions: (1) A lot may not be developed if it is less than one-eighth acre with a width or depth of less than 40 ft." Town of Norwich Zoning Regulations § 8 (1992).

This standard is far more permissive than the state zoning statute, which *requires a nonconforming lot to be owned independently from surrounding properties to qualify for exemption from new ordinances* ("grandfathering"). This variation in wording between the statute and the ordinance creates a gap between the two: "Although the question of whether this omission in the municipal ordinance violates state law is not squarely before us, the discrepancy in the language is highly probative of the conflict between the ordinance and the statute." *In re Richards* at 10. Here, the Court pointed out a relationship that Vermont municipalities are very familiar with - where a municipal ordinance is in direct conflict with a state law, the state law trumps the ordinance.

This case is an important reminder that Vermont municipalities are only allowed to do that which the legislature has explicitly authorized them to do by law (or charter revision). In other states, municipalities may enact legislation through ordinances that are not specifically enabled by the state ("home rule"). In Vermont, the authority to enact zoning comes from 24 V.S.A. Ch. 117. There have been a number of cases interpreting the power of municipalities to zone vis-à-vis the zoning enabling law. Following an earlier case, the Court in *Richards* stated "a municipality has zoning authority only in accordance with, and subject to, the terms and conditions imposed by the state in making the power grant." *In re Richards* at 8, citing *Flanders Lumber & Building Supply Co. v. Town of Milton*, 128 Vt. 38, at 45 (1969).

Merger of Small Lots

The other important issue addressed by the Court in *Richards* is the practical application of 24 V.S.A. § 4406 (1) - the law regulating mergers of small lots. The purpose of this law is to prevent non-conforming uses from continuing once local zoning is enacted, while allowing those uses that pre-date zoning to continue. In the case at hand, Nowicki had two lots, one that conformed with the minimum lot size (B), and one that didn't (A). If Nowicki won his argument, he would have been able to retain lot A as a non-conforming lot, and used lot B to develop a new residence. Based on the state law requirement that lots must be "in individual and separate and non-affiliated ownership from surrounding properties in existence on the effective date of any zoning regulation" to qualify for grandfathering, the Court saw otherwise, requiring lot B to be considered merged with lot A. It stated: ". . . although parcel two on its own is a conforming lot, its development would create a nonconforming lot in parcel [A]. This is precisely the 're-creation' of nonconforming uses we forbade in *Drumheller*." *In re Richards* at 6.

What this means is that 24 V.S.A. § 4406 (1) is "good law." The law requires contiguous lots in affiliated ownership to be considered merged, even if the lots are treated as separate by deed or for tax purposes. Additionally, municipalities should be careful when amending (or in a few cases, creating) their bylaws; many of the statutes in 24 V.S.A. Chapter 117 are required provisions in local zoning ordinances.

Conclusion

Based on the *Richards* holding, VLCT believes it is clear that where state law establishes a standard, a municipal ordinance cannot make its standard *less restrictive* than the state law. " . . . the local ordinance's expansive approach to the use of nonconforming lots undermines the legislative purpose of eliminating nonconforming uses." *Id* at 11.

With specific regard to 24 V.S.A. § 4406, VLCT believes that a town must follow the letter of the law in regulating existing small lots, as the statute provides explicit size regulations, which should be specifically referenced in a municipal zoning ordinance. VLCT recommends that municipalities pay close attention to the state law in enacting and amending their ordinances, and, additionally, pay attention to cases like *Richards* that specifically impact municipal legislation. The message is that municipal ordinances must "line up" with state law.

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