

## ENVIRONMENTAL COURT'S DE NOVO REVIEW IS UPHELD

The Vermont Supreme Court has affirmed the Environmental Court's grant of a modified zoning permit, which had originally been approved with conditions by the City of Burlington's Planning Commission. *In re Appeal of Lorentz*, No. 2002-239 (Vt. April 1, 2003).

The applicants in this matter had applied to the Burlington Planning Commission (PC) for a "certificate of appropriateness" to construct a mini-storage facility in Burlington's enterprise zoning district. The PC approved the application with a number of conditions; the applicants appealed certain of these conditions to the Environmental Court.

When this case was appealed to the Environmental Court, the applicants presented a modified site plan, which altered the proposed development. The City never objected to this new site plan. Environmental Court Judge Meredith Wright eventually granted the applicants' permit based on the modified site plan. On appeal, the Supreme Court stated, "We will not address arguments made for the first time on appeal." Essentially, the City had an opportunity to object to the admission of the altered site plan, and waived that opportunity. Because it failed to object at the trial level, the City was barred from presenting that argument before the Supreme Court.

It is important to realize that when the Supreme Court hears a case, it is limited in its review of the matter to those arguments presented by the parties in the proceedings below. This rule is in contrast to the general rule followed by the Environmental Court, which hears matters *de novo*. A *de novo* hearing occurs as if there had been no prior hearing, the evidence is heard all over again, and no deference is accorded to the tribunal below (such as a zoning board of adjustment).

Additionally, the Environmental Court has the power to permit, deny, or permit a development with conditions, much the same way the PC or zoning board of adjustment (ZBA) can. "The reach of the [environmental] court . . . is as broad as the powers of a zoning board of adjustment or a planning commission, but it is not broader." *In re Appeal of Lorentz*, quoting *In re Torres*, 154 Vt. 233, at 235 (1990). Therefore, when the applicant presented a modified site plan to the Environmental Court, Judge Wright was within her authority to approve or deny the application based on the new site plan. The point to take from this is that decisions of municipal planning commissions, zoning boards of adjustment, and development review boards can be altered in many ways by the Environmental Court. One way to ensure deference to your local decisions is for the municipality to adopt the Municipal Administrative Procedure Act (24 V.S.A. §§ 1201 et seq.), as well as review *on the record*. Once these procedures are enacted, the Environmental Court would review your decision as an appellate court, as opposed to hearing the matter *de novo*. Your decision would only be subject to a review of the law as applied to the case, as opposed to a review of the law and the facts.

A side issue in the case was a condition in the permit where the City had required the applicant to release the City from any liability should hazardous waste contamination be found at the site. The Supreme Court refused to uphold this provision, stating, "the City has not shown that it 'is suffering the threat of actual injury to a protected legal interest,' and instead 'is merely speculating about the impact of some generalized grievance.'" *In re Appeal of Lorentz*, quoting *Parker v. Town of Milton*, 169 Vt. 74, 77

(1998) (quoting *Town of Cavendish v. Vt. Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982).

- *Brian Monaghan, Attorney, VLCT Municipal Assistance Center*

***VLCT News***, May 2003