

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-450

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MARCH TERM, 2009

MAR 5 2009

In re Anne C. Rose Revocable Trust

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APPEALED FROM:

Environmental Court

DOCKET NO. 290-12-07 Vtec

Trial Judge: Merideth Wright

In the above-entitled cause, the Clerk will enter:

This is an appeal from an Environmental Court ruling approving a zoning permit to construct a single-family residence in the Town of Thetford. Appellants (hereafter neighbors), property owners who live in the neighborhood of the property, contend that the court erred in rejecting their claim that the zoning permit was inconsistent with a previously issued conditional use permit (CUP) requiring that the project's septic system be designed to minimize or prevent discharges resulting from flood waters. We affirm.

In February 2006, the Thetford zoning board of adjustment granted a CUP for applicant to construct a single-family residence on a 10.1-acre parcel adjacent to the Connecticut River in the Town's rural residential and flood-hazard overlay district. As required by the provisions of the zoning bylaws applicable to construction within the flood-hazard district, the CUP included conditions requiring that the project's water supply and sanitary sewage systems be designed to minimize or prevent infiltration of flood waters into the systems and discharges from the systems into flood waters. The bylaws provide that these standard conditions are necessary to meet the flood-management requirements of the Federal Insurance Administration.

In July 2007, applicant submitted an application to the Agency of Natural Resources, Wastewater Management Division for a wastewater system and potable water supply permit in connection with the proposed project. ANR approved the application the following month. Shortly thereafter, the Town's zoning administrator approved applicant's final zoning application for the project, noting that the approval was pursuant to the Town's earlier decision to issue a CUP and that the project "must comply with the [the] requirements" set forth in that decision. Neighbors appealed to the development review board, which upheld the administrator's decision. Neighbors then appealed to the Environmental Court, raising the question whether the zoning permit was consistent with the conditions in the CUP relating to the design of water supply and septic systems to minimize or prevent discharges caused by flood waters.*

Following a number of preliminary motions, the parties filed cross-motions for summary judgment. In September 2008, the court issued a written decision in favor of applicant. On the question of the zoning permit's consistency with the conditions in the CUP, the court found that, by its express

* Neighbors raised a second question relating to whether the proposed location of the septic system was consistent with the CUP, but have not appealed the court's ruling on that issue.


terms, the zoning permit referred to and mandated compliance with the requirements of the CUP. The court observed that neighbors' principal concern, relating to the design of the septic system approved by ANR, was not implicated in the appeal from the zoning permit but could be raised in a separate enforcement or other proceeding. Accordingly, the court entered judgment in favor of applicant. This appeal followed.

At the heart of neighbors' appeal is their belief that applicant obtained the septic permit from ANR based upon a material misrepresentation in its wastewater-permit application to the effect that the property was not located in a flood zone. Neighbors argue that the septic system approved as a result fails to comport with the CUP condition, premised on state and federal requirements, that it be designed to minimize or prevent the infiltration of flood waters into the system and discharges from the system into flood waters. The trial court here was correct in observing, however, that the zoning permit issued by the DRB, and challenged on appeal by neighbors, approved nothing inconsistent with the earlier CUP. The zoning-permit form merely contained a section noting that a septic permit had been issued by ANR. Plans for the septic system were not submitted in support of the zoning application, and the zoning permit did not purport to separately or independently review or approve the septic design or permit. Accordingly, we agree with the court's conclusion that neighbors failed to demonstrate a material inconsistency between the zoning permit and the CUP.

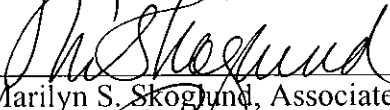
Neighbors suggest that that they have no other forum in which to allege that conditions relating to the septic system have not been met. Without purporting to prejudge the merits, however, we note that procedures appear to exist that would allow a petition to ANR to revoke a permit. As we observed in In re Lyon, 2005 VT 63, ¶ 6, under ANR's wastewater rules "[a]fter a permit is granted, ANR may revoke it 'either in response to a petition or on [its] own motion.'" (quoting the Vermont Wastewater System and Potable Water Supply Rules, § 1-306(a)). One of the grounds specifically identified in the Rules as a basis for revocation is "false or misleading information submitted in support of the permit." Id. § 1-306(b)(2). Thus, the trial court ruling here does not necessarily foreclose other procedural avenues to seek to establish that the septic design for the project is inadequate under state and federal wastewater standards.

Affirmed.

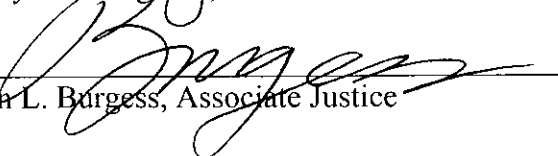
BY THE COURT:



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice