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

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SEP 4 2009

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-072

SEPTEMBER TERM, 2009

In re Mastelli Construction Application	}	APPEALED FROM:
	}	
	}	
	}	Environmental Court
	}	
	}	
	}	DOCKET NO. 220-10-07 Vtec
		Trial Judge: Thomas S. Durkin

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

Applicant appeals pro se from an environmental court ruling denying his application to build a single-family dwelling on his property in East Montpelier. Applicant contends the court erred in concluding that: (1) the property did not qualify as a preexisting, non-conforming, small lot; (2) the Town was not estopped from denying the application. We affirm.

The property in question was originally part of a sixty-six-acre parcel owned by the Hulls, of which five acres were located on the west side of Horn of the Moon Road (Road) and the remaining sixty-one acres were located on the east side. Zoning regulations were first enacted in the Town in 1970 and were amended in 1974 to require a minimum lot size of seven acres in the district where the property is located. In 1985, the Walkers obtained a fifty-acre parcel of the property, and in 1989 they obtained subdivision approval to divide the parcel into two lots, one consisting of approximately thirty-six acres on both sides of the road, and the other consisting of about 12.2 acres, with eleven acres on the east side of the road and 1.2 acres on the west.

In 1990, applicant acquired title to the 12.2-acre parcel. The deed described the lot as consisting of two parcels: the eleven acres east of the Road and the 1.2 acres west of the Road. The 11.2–acre parcel had already been developed with a single-family dwelling, which applicant occupied as his principal residence. In July 2007, applicant applied for a zoning permit to construct a second single-family residence on the 1.2-acre parcel. The zoning administrator denied the application, rejecting applicant's claim that the parcel was exempt from the seven-acre requirement as a preexisting, non-conforming, small lot, and the zoning board of adjustment upheld the ruling.

Applicant then appealed to the Environmental Court, claiming that the 1.2-acre parcel qualified as a non-conforming, preexisting, small lot, principally because it is separated from the adjoining eleven-acre parcel by Horn of the Moon Road. Applicant also claimed that the Town was estopped from denying the application because the zoning administrator had earlier approved a neighbor's application to build a single-family dwelling on a 3.8-acre parcel west of the Road. The court issued an initial decision in September 2008, granting the Town's motion for summary judgment on the estoppel issue. Thereafter, following additional discovery, the

court issued a second decision, granting the Town's motion for summary judgment on the permit application. This appeal followed.

Applicant renews his claim that the 1.2-acre parcel qualifies as a preexisting, non-conforming, small lot and is, therefore, exempt from the seven-acre minimum for single-family dwellings. Consistent with the requirement set forth in 24 V.S.A. § 4412(2), the Town's zoning regulations provide an exception for preexisting small lots that fail to meet minimum lot size requirements. The exception, in pertinent part, provides: "Any lot in individual and separate and non-affiliated ownership from surrounding properties in existence on the effective date of these Regulations may be developed for the purposes permitted in the district in which it is located, even though not conforming to minimum lot size requirements." East Montpelier Zoning Regulations, § 2. As we have explained, the small lot exception "is a sort of limited grandfather clause allowing for limited development on previously laid-out lots that is not seen as unduly disruptive of the desired ends of zoning." Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 51 (1986); accord In re Richards, 174 Vt. 416, 419-20 (2002). We have also held, however, that "[a] goal of zoning is to phase out such uses," Drumheller v. Shelburne Zoning Bd. of Adjustment, 155 Vt. 524, 529 (1990), and that "zoning provisions allowing nonconforming uses should be strictly construed." In re Gregoire, 170 Vt. 556, 559 (1999) (mem.).

On appeal, applicant argues at length that, although acquired as part of a single 12.2-acre lot, the 1.2-acre parcel qualifies as a separate non-conforming lot because a right-of-way—Horn of the Moon Road—effectively divides it from the eleven-acre parcel and that this prevented the two lots from merging when the zoning ordinance was enacted. See In re Richards, 2005 VT 23, ¶ 6 (holding that "adjoining property held in common ownership on the effective date of zoning is deemed merged by operation of law"); cf. Wilcox v. Village of Manchester Zoning Bd. of Adjustment, 159 Vt. 193, 197 (1992) (holding that "a right-of-way which, because of location and function, effectively separates the parcels that it physically connects, so that they cannot be used in the ordinary manner as a single 'lot,' may render those parcels separate for purposes of" the small lot exception).

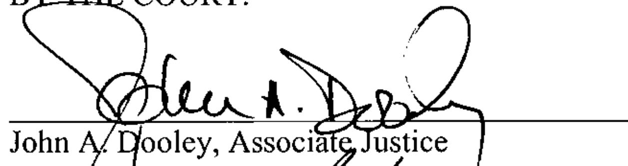
The argument is unavailing. Even assuming that the Road may prevent the merger of lots on either side, there was no evidence here that, as the trial court found, the 1.2-acre parcel "was ever separately held or otherwise existed as an independent lot when the Town enacted its Zoning Regulations." Rather, the evidence showed that the 1.2-acre lot was then wholly subsumed within a larger five-acre parcel which existed on the west side of the Road when the zoning regulation was enacted and was only much later identified as a separate portion of the 12.2-acre parcel sold to applicant. The Legislature has specifically defined non-conforming small lots as those that existed prior to the applicable zoning bylaw. See Drumheller, 155 Vt. at 529 ("Lots that are smaller than the minimum lot size restrictions are nonconforming uses, allowed only because the use preexists the applicable zoning requirement.").

Thus, it is possible that, at the time of enactment of seven-acre minimum, the five-acre parcel was grandfathered as a preexisting non-conforming small lot. Plainly, however, this same status would not devolve upon applicant's smaller 1.2-acre parcel, which was only later created from the five-acre parcel. To hold otherwise would literally permit the compounding of a preexisting non-conforming use, in clear violation of the public policy in favor of restricting or eliminating such uses, see id. at 529, and prohibiting uses that compound or expand the preexisting non-conformity. See DeWitt v. Town of Brattleboro Zoning Bd. of Adjustment, 128 Vt. 313, 320 (1970) (noting that public policy is to "carefully limit the extension or enlargement of nonconforming uses") (quotation omitted). Thus, the 1.2-acre parcel does not qualify as a preexisting non-conforming small lot.

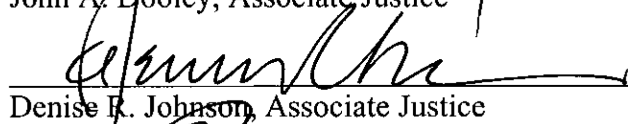
It is unclear whether applicant has renewed his claim that the Town should be estopped from denying the application based upon the zoning administrator's decision in a separate case granting a permit to construct a single-family dwelling on a neighboring 3.8-acre parcel. We conclude, in any event, that the trial court correctly concluded that the Town was not bound by any error that may have occurred in an unrelated case.

Affirmed.

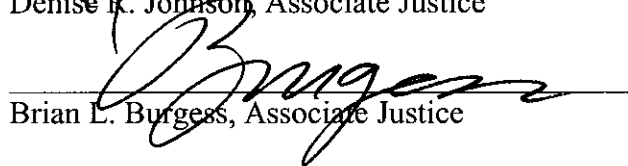
BY THE COURT:



John A. Dooley, Associate Justice



Denise R. Johnson, Associate Justice



Brian L. Burgess, Associate Justice