

STATE OF VERMONT
WINDSOR COUNTY, SS.

SUPERIOR COURT OF VERMONT
DOCKET NO. S305-96 WrCa

RICHARD A. BASCOM,
Petitioner

v.

TOWN OF WEST WINDSOR
BOARD OF SELECTMEN,
Respondent

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Also @ 2 Vt. Tr. Ct. Rep 136

NOTICE OF DECISION AND ORDER

This matter came before the court for hearing on June 19, 1997. Petitioner was present and represented by Jonathan L. Springer, Esq. Respondent was represented by Matthew T. Birmingham, Esq. Petitioner seeks an order overruling the Selectboard's denial of a highway access permit for Petitioner's land subdivision project. On the basis of the record of the proceedings before the Selectboard and the arguments of counsel at the hearing, the court herein sets forth its findings of fact and analysis, and denies Petitioner's request.

Facts

Petitioner is the owner of a parcel of land of 87.92 acres in the Town of West Windsor off Seams Road, a public highway. There is an existing field road that gives access from the whole parcel to Seams Road. An abutter, Kimball, has a driveway that joins the field road near Seams Road, and thereby obtains its access to Seams Road at the same location as the field road. Directly opposite the point where the field road joins Seams Road is a double driveway to a house and garage of Kenyon. A short distance to the southwest from the point where the field road joins Seams Road is a driveway serving property of Lemire. Seams Road curves at the point where the field road joins Seams Road. Thus, at this point, in addition to the field road that already exists to provide access to Petitioner's land, there are three other driveways providing access off Seams Road to other lots.

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Petitioner has undertaken a subdivision project to divide his land into six lots. In 1990 he obtained Planning Commission approval for access to Seams Road by easement for Lot #1, a parcel of 6.57 acres, which access would be by a driveway that joins the field road before the field road joins Seams Road. Lots #1 and #6 have road frontage along another public highway, and are not involved in the issues in this case. In 1995, Petitioner sought Planning Commission approval for access to the three lots that he wished to create out of the remainder (*i.e.* two additional lots), those being Lots #3, #4, and #5. All of them would have access to Seams Road along the field road, named on the subdivision survey maps "Bascom Farm Drive". As noted above, Kimball's driveway, and the driveway to Lot #2, would also be joining Bascom Farm Drive before it joined with Seams Road. After extensive hearings, the Planning Commission issued its Findings of Fact, Conclusions, and Notice of Decision on April 9, 1996, in which it approved Petitioner's request for access by easement for Lots #3, #4, and #5, with several conditions and requirements. Therefore, Petitioner had obtained all the necessary permits from the Planning Commission for the subdivision project under the requirements of West Windsor's Ordinance Pertaining to Access onto Highways and Ordinance Pertaining to Development Roads and Improvements to Class 4 Highways. Specifically, the Planning Commission had jurisdiction under § 6.5-1, which provides as follows:

Frontage on or access to public highway - No land development may be permitted on lots which do not have frontage on a public highway or, with approval of the Planning Commission, access to such a road by a permanent easement or right-of-way at least 20' in width.

The reason that Planning Commission approval was required was that Lots #2, #3, #4, and #5 all needed access to Seams Road, a public highway, by a permanent easement or right of way.

In granting approval, the Planning Commission specifically stated: "Based upon the evidence presented, the Planning Commission finds that an access road to the proposed subdivision can be constructed along this easement, safely intersecting the Seams Road as represented in the drawings and reports submitted." It required the precise boundaries of the easement and the Town right of way for Seams Road to be surveyed, which had not yet occurred at that point. It continued by requiring

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that construction of the drive be completed in conformance with Standard B-71 of the Vermont Agency of Transportation, which establishes specifications for residential and commercial access drives. It specified minor permissible variations. It required that the elevation of the drive be raised six inches which would have the effect of increasing corner sight distances to 260 feet uphill of the intersection and to 292 feet downhill. The minimum corner sight distance under Standard B-71 is 275 feet. It also required that the grantees of the lots be legally obligated to undertake maintenance obligations on the road "with particular care given to sight distances at the Seams Road intersection by proper trimming of foliage and diligence and care in the exercise of snow removal." It also required the Petitioner to arrange with the Town "to place a caution sign in the right of way an appropriate distance uphill from the intersection warning cars traveling down the Seams Road of entering traffic ahead, and a stop sign on the Bascom Farm Drive at its intersection with the Seams Road." An additional requirement was that prior to deeding any lots, the Petitioner needed to fulfill a number of requirements including obtaining an inspection by the Administrative Officer and Selectboard of the Town and a certification that the project "is in compliance with this decision and pursuant agreements with the Selectboard"

It is clear that safety of vehicular traffic was a key consideration of the Planning Commission in its consideration of the project. Among the evidence it took was a traffic impact study, and some of the recommendations of that study were adopted by the Commission as conditions for its approval of the project.

Although the Planning Commission required that the project comply with the specifications in Standard B-71, it made no comment on the fact that it would be impossible for the access road to comply with the 100 foot minimum separation distance requirement between driveways that is established in Standard B-71. Other existing driveways are already in place at locations significantly less than 100 feet away, and there are no other options for the location of the farm road, since Petitioner has no other frontage on Seams Road except for the width of the farm road at its access point.

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After having obtained Planning Commission approval for access easements, petitioner was also required to obtain from the Selectboard a highway access permit authorizing construction of an access road off the public highway. A state statute, 19 V.S.A. § 1111, requires that "[n]otwithstanding any other statutory requirement, a permit shall be required for any use of any highway right-of-way, consistent with the provisions of this section." The statute authorizes the Selectboards of Towns to issue such permits, and authorizes them to adopt rules "to carry out the provisions of this section as will adequately protect and promote the safety of the traveling public and maintain reasonable levels of service on the existing highway system." It further provides that as a condition of any permit issued, "compliance with all local ordinances and regulations relating to highways shall be required."

Pursuant to this section, the Town of West Windsor has in place an "Ordinance Pertaining to Access Onto Town Highways". One of the provisions of that ordinance is: "The Department of Highways Standards B-71 for Residential and Commercial Drives (latest revision dated March 10, 1995) are adopted as part of this ordinance." Another provision is that after the filing of an application, "[t]he selectmen will examine the premises within thirty (30) days of the receipt of an application after which they shall issue a permit with conditions attached as they deem necessary to insure that the standard adopted herein will be met."

On May 13, 1996, Petitioner submitted an Application for Access Permit to the Selectboard. The Selectboard met to consider the application, and voted to deny it. The Board sent Petitioner a letter dated June 12, 1996 explaining the reasons for denial as follows:

The Selectboard took this action because the proposed access did not meet the minimum criteria under the B-71 standards for residential and commercial drives. Specifically, your proposal did not meet:

1. The minimum corner sight distance; and
Item 10-B71
2. The minimum separation distance between driveways.
Detail F-B71

In addition your proposal did not adequately address:

1. Drainage from your drive onto adjacent properties.
2. Proper signage to warn of approaching intersection.
3. Erosion control procedures during construction.
4. Pedestrian safety due to increasing traffic.

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The Selectboard invited Petitioner to submit a revised application that addresses the B-71 standards and the identified concerns.

On July 10, 1996, Petitioner filed this action for Rule 75 review of governmental action. Petitioner's position is that the Selectboard has no authority to deny a permit under these circumstances, that it acted unlawfully, and that the court should order it to issue the permit and pay expenses of Petitioner incurred as a consequence of the illegal action of the Selectboard.

Discussion

This action is before the court on the Petitioner's request under Rule 75 of the Vermont Rules of Civil Procedure that the court review and reject the decision of the Selectboard denying the application for a highway access permit. The Petitioner asks the court to order the Selectboard to issue a highway access permit to him to enable the subdivision project to proceed.

This case is therefore not based on any legal right the Petitioner has to appeal a decision made by the Selectboard. Certain decisions made by local governmental bodies are reviewable by the court as a matter of law. Examples are appeals from decisions of the Board of Civil Authority on property tax valuations, 32 V.S.A. § 4461, decisions of the Board of Adjustment on zoning permits, 24 V.S.A. § 4471, and appeals from decisions of the Selectboard laying out or discontinuing highways, 19 V.S.A. § 740. In such cases, a proper party has a right to appeal the decision made by the governmental body below, and to have it reviewed by the court. In some cases, the appealing party is entitled to a new hearing as a matter of law. City of Barre v. Town of Orange, 138 Vt. 484 (1980) (*de novo* review of property tax assessment). In other cases, the standard of review is an appellate one. DeWitt v. Town of Brattleboro Zoning Board of Adjustment, 128 Vt. 313, 319 (1970) (deferential review of decisions by zoning board of adjustment).

This case is not of the type in which there is a statutory right of appeal of any kind. In this case, the decision making authority is vested in the Selectboard, and a petitioner can only obtain relief in court from a decision of the Selectboard under Rule 75 if the petitioner can show that the Board

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abused its discretion in exercising the specific authority granted to it. Proctor v. Hufnail, 111 Vt. 365 (1940). The role of the court is not to substitute its own judgment for that of the Board, but to determine whether the Board could reasonably have reached the result it did within the bounds of its authority and based on the facts and circumstances before it. In re: Petition of Town of Bennington, 161 Vt. 573, 574 (1993). Judicial review is "in the nature of *certiorari*." Chapin Hill Estates, Inc. v. Town of Stowe, 131 Vt. 10 (1972). The standard of review is very narrow, "as narrow as any in our law." State v. Forte, 159 Vt. 550, 557 (1993).

The Selectboard is charged with broad responsibility for the management of the Town road system in a manner consistent with public safety. 19 V.S.A. § 304. It is also charged with the specific responsibility to issue highway access permits for access to and from property adjacent to highways. 19 V.S.A. § 1111. It is required to issue access permits, and prohibited from denying access, if such access can be accomplished reasonably, and the test for reasonableness is whether or not it can be done safely. 19 V.S.A. § 1111. Thus, the Selectboard may not deny access permits for reasons other than safety, and it may not use safety as a pretext for a denial that is really on other grounds, but it may deny access permits if access to and from the adjacent property cannot be done in a manner consistent with the demands of public safety. It has not only the authority but the responsibility to oversee the public safety of the community in relation to the highway system within the Town.

In carrying out its responsibilities under this statute, the Selectboard of the Town of West Windsor has adopted an Ordinance Pertaining to Access Onto Town Highways, in which it sets forth its standards for safety for highway access permits as those established in Standard B-71 of the Agency of Transportation. It also adopts the requirement from the state statute that the criterion to be used by the Selectboard in granting or denying permits is safety only, and not other considerations. This is the principle behind the statement that the Selectboard "shall" issue a permit, but may attach such conditions as are necessary for public safety. A reasonable interpretation of this provision is that if there is any way, consistent with safety standards, that the permit can be granted, the Selectboard may attach the requirements necessary for safety but must issue the permit. It does not automatically

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follow that if the project as proposed cannot be accomplished without violating safety standards; then the Selectboard is still required to issue a permit. This would conflict with the terms of 19 V.S.A. § 1111 and common sense.

In this case, the Selectboard was not the only governmental body charged with reviewing safety aspects of the project. The Planning Commission also had the responsibility of reviewing safety aspects of the proposed subdivision in connection with its task of determining whether or not to approve the Bascom Farm Drive as appropriate easement access to the proposed subdivision, and it did so. Such action on the part of the Planning Commission, however, does not diminish the responsibility of the Selectboard to engage in its own safety review from its own experience and perspective, and the conclusions of the Planning Commission are not binding on the Selectboard. The Selectboard must still exercise its own responsibility pursuant to the terms of 19 V.S.A. § 1111. This was recognized by the legislature and expressed in the terms of 19 V.S.A. § 1111 itself,¹ and further recognized by the Planning Commission in granting its approval of the project.²

Independent review by the Selectboard also makes sense for two reasons. First, the focus of the Planning Commission's consideration of safety features is likely to be on of the proposed easement itself, which is central to its task. The Planning Commission may or may not have in mind all the factors to be taken into consideration by the Selectboard. An example is the fact that the Planning Commission decision does not refer specifically to any impact on pedestrian traffic, whereas the Selectboard identified that issue as an important area of safety concern. Second, safety of the public is so important that it is in the public interest for both bodies to review the proposed project from a safety perspective, and there is nothing in the statutes and ordinances to indicate that this double

¹"Notwithstanding any other statutory requirement, a permit shall be required for any use of any highway right-of-way, consistent with the provisions of this section." 19 V.S.A. § 1111(a) (emphasis added).

²See the requirement that the Petitioner obtain inspection and certification from the Selectboard that the project "is in compliance with this decision and pursuant agreements with the Selectboard. . . ." Findings of Fact, Conclusions, and Notice of Decision of West Windsor Planning Commission dated April 11, 1996, In re: Application by Richard Bascom, Conclusions and Decision, Paragraph 4.b.

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layer of review should be foreshortened when both the Planning Commission and Selectboard have review tasks related to safety issues.

The facts show that the intersection of the Bascom Farm Road with the Seams Road is already a fairly complicated one. "Three driveways currently converge on Seams Road at the proposed point of access, namely driveways of Lemire, Kimbell, and Kenyon." The farm road, which currently serves one property but under the subdivision proposal would serve four lots, converges with the Kimbell driveway before it reaches Seams Road, making five properties that would be served from the single highway access point for which the permit was requested. As the map shows, under the subdivision proposal, a total of seven properties would have access to and from Seams Road in the same area, coming from three different directions, one of them being the Bascom Farm Road, which would serve five lots. As a result of the proposed subdivision, the number of inhabitants would be increased, and the level of both vehicular and pedestrian traffic would be increased. All of this would take place at a point on Seams Road where there is a curve in the road. The Planning Commission, in approving the subdivision, placed certain conditions on its approval to address safety concerns at the proposed intersection. Specifically, it required that the elevation of the drive be raised six inches, that lot owners be legally obligated to perform maintenance functions that would ensure visibility in approaching the intersection, that the Petitioner be responsible for placing a caution sign on Seams Road and a stop sign on Bascom Farm Drive, and that construction of the drive conform to Standard B-71 of the Vermont Agency of Transportation with minor specified variations. These conditions were set forth in general terms without technical specifications. They do not preclude the Selectboard from specifying implementing details, or from applying more stringent requirements based on the same safety risks addressed by the Planning Commission and/or on additional risks that the Board may identify that were unaddressed by the Planning Commission.

The Selectboard did not issue an unexplained denial of the access permit. It was specific about the safety reasons for its denial.

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The first reason it gave was that the proposal does not comply with minimum sight corner distance requirements as established by Standard B-71. The applicable sight corner minimum distance requirement is 275 feet, and the sight corner distance for the proposed project is 292 feet in one direction and 260 feet in the other direction. Petitioner claims that the project's failure to comply with this standard is *de minimis*. However, it is clear from the Planning Commission's Decision that sight distances were extremely important in its own consideration of safety issues at this already-complex, and potentially more complicated, intersection. The Selectboard is in a better position than the court to determine whether such a level of deviation is or is not important in the particular context, and the Selectboard determined that it was. Its decision is supported both by the terms of Standard B-71, and by the Planning Commission's concerns about sight distances and the requirement that Standard B-71 be observed.

The second reason given was that the minimum separation distance between driveways required by Standard B-71 cannot be met. Petitioner argues that since he is seeking access over an existing road that already provides access, and that all other driveways are already in existence, there is nothing he can do to revise his proposal to meet the requirements of Standard B-71. Even though that is true, it is entirely plausible that the fact that traffic from so many driveways would be converging on the public highway at the same spot significantly affects safety at that spot. As previously stated, the Selectboard is entitled to make a judgment about that issue independent from the one made by the Planning Commission. Just because there are no alternative access sites for Petitioner's project does not mean that highway access must be permitted if it is not safe to do so.

These two reasons sufficiently support the decision of the Selectboard. The Board went further, however, and identified four areas not sufficiently addressed in the proposal. Two of them are directly pertinent to safety concerns. One is the adequacy of signage to warn of the approaching intersection. The Planning Commission also identified this as an area of concern with respect to safety. The other is the safety of pedestrians. This is an issue that was not specifically addressed in the Planning Commissions Findings, Conclusions, and Decision. Both are within the subject matter

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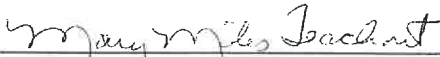
of safety that is the factor on which the Selectboard's decision must turn, and the circumstances of the intersection show that both are legitimate concerns. The other two areas identified were drainage onto adjacent properties, and erosion control during construction. The relationship of these factors to safety concerns is not apparent.

Overall, however, the Board's letter of denial identifies four specific safety problems that are readily apparent in the record in the case, and that are proper bases for the denial of a highway access permit. The approach of one group of Selectboard members may be more cautious than the approach of another group of Selectboard members on the Board at a different time, and different groups can reach different but nonetheless reasonable conclusions on the same information in difficult cases. The legislature has not provided for any right of appeal from such judgment calls, and therefore the judgments of the Selectboard will not be undone by the court as long as they are within a reasonable range. The court's role is not to make its own conclusion on this point, but to determine from the record whether the Selectboard had a proper basis for making the judgment that it made, and the record shows that it did. Therefore, the court concludes that Petitioner has not shown a basis for the court to disturb the Board's denial of a highway access permit.

ORDER

For the foregoing reasons, Petitioner's request for an order is DENIED, and the case is DISMISSED.

Dated at Woodstock this 25th day of July, 1997.


Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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