

VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 22-ENV-00087

Laidlaw CU

ENTRY ORDER

This Entry Order memorializes, in writing, the Court’s oral decision on the parties’ respective motions for judgment on partial findings, announced on the record at trial on October 9, 2024, on the threshold issue of whether certain channels, located on or adjacent to the subject property, are “Streams” as defined in the applicable zoning regulations. The Court’s finding and conclusions follow.

Applicants/Appellants, Kimberly and William Laidlaw (Applicants), own real property at 316 Dunbar Hill Road in the Town of Fayston that is developed with an existing single-story hunting camp. The existing camp has a non-potable water supply system and a wastewater system of unknown location. The Applicants have applied to upgrade their water and wastewater infrastructure to include a drilled well, waterline, septic (step) tank and leach field. Applicants’ triangular-shaped property is bounded on its easterly side by a channel that conveys surface water at certain times of year. A second, similar channel is located at or near the property’s southwesterly corner. The Town of Fayston (Town) has characterized the channels as “streams,” as defined in the Fayston Land Use Regulations (Regulations). See Town of Fayston Land Use Regulations at 148 (“Stream”). If the channels are streams, it is undisputed that the Applicants’ project is located within certain designated buffer strips, where development activity is substantially limited in the absence of a waiver or variance. Both parties moved for judgment on partial findings on the issue of whether the channels on or adjacent to the property are streams within the meaning of the Regulations. V.R.C.P. 52(c).

In interpreting zoning ordinances, we apply familiar rules of statutory construction. In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. First, we “construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance.” Id. (citations omitted). If there is no plain meaning, we will “attempt to discern the intent from other sources without being limited by an isolated sentence.” In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). In construing statutory or ordinance language, our “paramount goal” is to implement the intent of its drafters. Colwell v. Allstate Ins. Co., 2003 VT 5, ¶ 7, 175 Vt. 61. We will therefore “adopt a construction that implements the ordinance’s legislative purpose and, in any event, will apply common sense.” In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578 (quotations omitted); see also In re Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22 (quoting Lubinsky v. Fair Haven Zoning Bd., 148 Vt. 47, 49 (1986)) (“Our goal in interpreting [a zoning regulation], like a statute, ‘is to give effect to the legislative intent.’”). Finally, because zoning regulations limit common law property rights, we resolve any uncertainty in favor of the property owner. Bjerke Zoning Permit Denial, 2014 VT 13, ¶ 22. With this framework in mind, we turn to the definition of “Stream” in the Regulations which is at the heart of this dispute.

The Fayston Land Use Regulations (last amended June 2018)¹ at Article 10 define a stream as:

Stream. Any surface water course in the Town of Fayston as depicted by the U.S. Geological Survey 7.5 minute Series (topographic) maps or as identified through site investigation; excluding artificially created irrigation and drainage channels.

It is undisputed that the channels are not depicted on the USGS 7.5-minute series maps.² Accordingly, we look to whether the channels can be identified as streams through site investigation.

The Regulations do not separately define the term “site investigation.” Similarly, the Regulations do not provide guidance on who is permitted to determine whether a particular channel or watercourse is a stream through site investigation and/or what standards they are to apply, when conducting such an investigation. However, the Regulations do use the term “site investigation” in other provisions, such as to identify significant natural and historic resources. See Land Use Regulations at 5.4(B)(1); see also 6.2(C)(4) (site investigation of fragile features and natural and cultural resources); 6.3(E) (site investigation of critical wildlife habitat, wildlife travel corridors, and natural areas); 6.3(I) (site investigation of historic and archaeological sites and resources). Taken together, these provisions lead the Court to conclude that the term “site investigation” requires some level of technical identification beyond mere casual observation, as was conducted by the Zoning Administrator in this case (further discussed below). This is also consistent with the ordinary meaning of the word “investigation,” which when coupled with “site,” suggests a formal, careful and systematic examination or inquiry into the relevant characteristics of a site, feature or resource. See e.g., Webster’s II New College Dictionary (3rd ed. 2005) at 597 (defining “investigate” as “to observe or inquire into in detail; to make a systematic inquiry or examination”); Black’s Law Dictionary (6th ed. 1990) at 825 defining “investigation” as the “process of inquiring into or tracking down through inquiry”).

Moreover, to the extent that both parties conducted what they believe to be a site investigation under the Regulations, we must evaluate the credibility and persuasive effect of the evidence presented to the Court. We address that competing evidence as follows:

For the applicant, Mr Murawski, a licensed engineer with 25-years of experience and a focus on water resources, read to the Court the definition of “streams” from the Regulations, and explained how he collected information and arrived at an opinion that the channels are not streams. Mr. Murawski explained that he conducted a drainage area investigation and determined that neither channel came close to contributing a large enough drainage area to qualify as a stream. Mr. Murawski also looked for the presence of aquatic life and determined that there were no signs of habitat to support aquatic life.³ Lastly, Mr Murawski explained that channel stability and movement can indicate the presence of a stream, but that he did not identify any visual evidence of channel instability during his site

¹ The Regulations have since been amended, but the version of the Regulations last amended in June 2018 were in effect at the time of application.

² At trial, there was testimony from the Applicants’ expert, Mr. Murawski, that the 7.5 minute series maps predominately depict perennial streams. While not necessarily binding on what constitutes a stream under the Regulations, the specific reference to the 7.5 minute series indicates to the Court that the size of and frequency of flow in a channel are relevant considerations for determining whether the channel constitutes a stream.

³ Mr. Murawski also observed that, immediately upstream from the property, both channels are fed (when water is present) by roadside ditches and corrugated metal culverts that are not sized/designed appropriately for streams and that could not support aquatic life.

investigation. Taking all these factors together, Mr. Murawski reached an opinion that neither channel rises to the level of a stream.

In contrast, the ZA testified that he visited the site and made a visual observation of surface water running through the easterly and southwestern channels, but that he is not familiar with what comprises a site investigation for purposes of determining what constitutes a stream under the Regulations. He further testified that he did not observe signs of aquatic life, nor did he provide any other details regarding how he conducted a site investigation beyond his casual observations of water in the channels.

Without a substantive definition of site investigation in the Regulations, we find that Mr. Murawski's testimony provides a more systematic, careful, complete and, ultimately, credible inquiry into and analysis of the subject channels, leading the Court to conclude that they are not streams under the Regulations.

We also note that the Town sought to prove that these channels are streams by offering a certified copy of Appellant's warranty deed to the Property, which describes the Property boundaries in relation to two brooks. The Town also sought to rely on the Applicants' site plan which depicts the channels as brooks and includes a demarcation of the 50-foot buffer area. These offerings, in and of themselves, do not prove the existence of a stream, as defined by the Regulations, which requires a site investigation.⁴

Based on the evidence received regarding the respective site investigations conducted and the observations made in conjunction with those investigations, the Court finds and concludes that the eastern and southerly channels do not constitute streams as defined in the Fayston Land Use Regulations.

Accordingly, the Town's Motion for Judgment on Partial Findings is DENIED. Applicant's Motion for Judgment on Partial Findings is GRANTED. The Court will render judgment on the relevant issues remaining for adjudication, as set forth in Applicant's Statement of Questions, on the basis of the evidence presented.

Electronically signed on October 10, 2024, pursuant to V.R.E.F. 9(d).



Joseph S. McLean
Superior Court Judge
Environmental Division

⁴ The Applicants' engineer conservatively assumed that the channels were streams for design purposes, but in doing so did not intend to concede that the channels were streams as defined in the Regulations.