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October 23, 2014

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TOWN CLERK'S OFFICE
EAST MONTPELIER, VT

C. Bruce Johnson, Zoning Administrator
Town of East Montpelier
P. O. Box 157
East Montpelier, VT 05651

Re: Duane Wells/Zoning Application #14-057

Dear Mr. Johnson:

This firm represents Duane Wells regarding zoning application #14-057. The purpose of this letter is to ask that you reconsider your denial of that application and issue a permit for construction of an accessory dwelling at 30 Cutler Heights pursuant to Section 4.2 of the town's Land Use & Development Regulations.

In your October 14, 2014 letter to Duane, you denied him a permit on the sole grounds that the Environmental Court's decision of September 26, 2011 precludes the construction of "any new dwelling" at 30 Cutler Heights. Your reading of Judge Durkin's opinion is overly-broad by far, is erroneous as a matter of law, and will certainly not withstand judicial review. While it is true that under certain circumstances a zoning authority should not entertain repeated applications for the same land use permit, this rule (referred to by Vermont courts as the "successive application doctrine") clearly does not apply in this case. Rather, that doctrine only bars a subsequent application that presents "the same issue" or an "essentially identical" issue as the first application, in which case the second application may be barred, but only to the extent that the issue presented has already been "fully litigated." *In re: Appeal of McGrew*, 186 Vt. 37, 43 (Vt. 2009).

Unless a newly-filed application for a land use permit presents virtually the same issues presented in a previously-denied application for the same property, a zoning authority must consider the new application, especially when the application "has been substantially changed so as to respond to the objections raised in the original application." *In re Application of Carrier*, 155 Vt. 152, 158 (Vt. 1990). This is precisely what the applicant has done here. See also *In re JLD Properties of St. Albans, LLC*, 2011 VT 87 (successive application doctrine does not bar re-application after material change of circumstances); *In re Appeal of Jenness & Barrie*, 2008 VT 117 (second application allowed because it "did not concern exactly the same subject matter" as first application).

Duane's original 2010 application for a building permit was predicated upon his belief that his property had effectively been subdivided by a town highway so that it now comprised two separate lots, each capable of supporting a single family dwelling. He sought a permit to construct a conventional 1,800 square-foot single family dwelling on the undeveloped easterly lot, pursuant to Article 3 of the town's Zoning Regulations. The town denied the permit on the grounds that Duane's property constituted a single lot for zoning purposes and that he possessed insufficient acreage to construct two separate single family dwellings on the one lot. The sole issue presented to Judge Durkin on appeal was whether Duane's property constituted two separate building lots, as Duane believed, or a single building lot, as the town asserted. The Environmental Court decided that issue in the town's favor.

Duane accepts the court's ruling as final and no longer seeks to build a single family residence. Rather, his current application falls under an entirely different provision of the zoning ordinance, i.e., construction of an accessory building on his single lot pursuant to Section 4.2 of the Regulations. Your letter does not dispute that Duane's application comports with the requirements of that Section for construction of an accessory building, but merely asserts that it is barred by the Environmental Court's ruling. However, under the successive application doctrine, it is impossible that Judge Durkin's decision could determine Duane's right to construct an accessory building because that issue was never presented to him as part of the first application. Indeed, this situation falls squarely within the Vermont Supreme Court's holding that a zoning authority must consider a subsequent permit application when it is tailored to "respond to objections raised in the original application . . . ." *In re Application of Carrier*, 155 VT 152, 157 (VT 1990).

Under these circumstances, your assertion that Judge Durkin somehow banned "all new dwelling structures" is overly-broad by far. The only thing that Judge Durkin determined as a matter of law was whether Duane had the right to develop his land as proposed in his 2011 permit application, i.e., the right to treat his property as two separate lots and to construct a single family dwelling on the undeveloped portion. At no time did Judge Durkin consider Duane's right to build an accessory dwelling on a single lot, so his right to do so now cannot be barred by the successive application doctrine.

For the foregoing reasons, we insist that you reconsider your denial of Duane's pending application and issue a building permit for construction of an accessory building at 30 Cutler Heights.

Very truly yours,

John C. Page

cc: Duane Wells
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