IN THE SUPREME COURT
FOR THE
STATE OF VERMONT
Supreme Court Docket No. 2010-165

In re: Tyler Self Storage Units Permits	**]**	**Appealed from**
	]	**Vermont Environmental Court**
	]	**Docket No. 189-9-09 Vtec**

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BRIEF OF THE APPELLANTS
ANGELA ARKWAY, *ET ALIA*

****

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STATEMENT OF THE ISSUE

Did the Environmental Court clearly err when it held that that a 72-unit, self-storage facility qualifies as a permitted use in the Dorset Village Commercial zoning district?

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INTRODUCTION

This appeal presents the question of whether a 72-unit, three-building, self-storage rental complex qualifies as a permitted use in the Town of Dorset Village Commercial ("VC") zoning district. The facts are not in dispute.

The Environmental Court held that the self-storage facility qualified as a permitted use based on the Court's interpretation of the meaning of "retail rental." The Court acknowledged that its interpretation was inconsistent with express provisions of the zoning bylaws, but believed the interpretation to be in their "spirit." The Court also found that the 72 self-storage units qualified under the bylaws as "shops" or "stores."

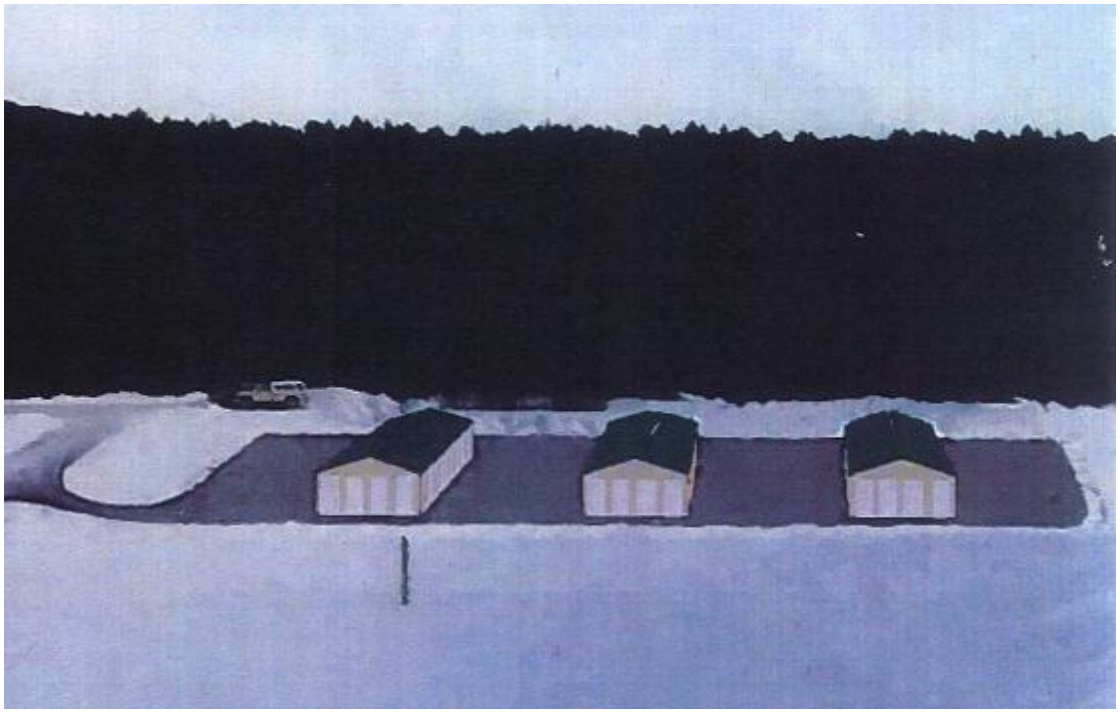
The Appellants are a group of 42 interested property owners. They argue in this brief that the Court's analysis (a) arbitrarily substituted the Court's beliefs for the plain text of the bylaws, (b) undermined the stated purposes of the applicable zoning district, (c) would create irrational results and (d) was not supported by the record. Therefore it should be reversed.

STATEMENT OF THE CASE

Bradford Tyler owns a 5.6-acre lot at 340 Route 30 in the Town of Dorset (the "Property"). It is located in the VC zoning district. Printed Case ("PC") at 26.

On January 30, 2009, Mr. Tyler filed an application to construct three self-storage buildings on the Property. Each of the buildings would be 100 feet long and 20 feet wide for a total of 2,000 square feet. Each building would contain 24 separate storage bays. The three buildings together would create a total of 6,000 square feet of new construction with 72 different storage units, each with its own garage-style door. Customers would include businesses that would rent units to store equipment, supplies and inventory. PC at 24-25; 27.

The detail below furnished by the applicant[1] depicts the proposed facility.



After proceedings before the Planning Commission, the Zoning Administrator issued a zoning permit approving the proposed use on May 21, 2009. Three separate groups of citizens appealed this decision to the Dorset Zoning Board of Adjustment ("ZBA"). PC at 26.

Two members of the ZBA abstained from participation in the appeal. After a public hearing, the ZBA issued detailed findings of fact and a legal analysis in its decision dated August 31, 2009. A majority of the ZBA members participating in the appeal found that the proposed storage use was not permitted in the VC zone. PC at 1-8; 26.

The applicant questioned whether the ZBA's decision was legally binding because it was signed by only four members of a nine-member board. Accordingly, 63 interested parties appealed to the Environmental Court for *de novo* review of the issue of whether the proposed

[1] Exhibit attached to applicant's affidavit in support of summary judgment.

self-storage complex is permitted under the Dorset zoning bylaws (the "Bylaws"). PC at 29. These Appellants contended that the project was not a permitted use in the VC zone.

The parties entered into a stipulation of fact and then the applicant and the Appellants filed cross motions for summary judgment. PC at 26-27.

The applicant asserted a series of textual arguments, cast in the alternative, to support his claim that the self-storage complex was a permitted use. The Appellants argued that the plain meaning of the Bylaws and the stated purposes of the zoning district supported their claim that the ZBA correctly determined that the self-storage facility was not a permitted use in the VC zone. PC at 28-43.

By order filed July 9, 2010, Judge Thomas S. Durkin granted summary judgment to the applicant. He found that the 72 storage bays would be rented to "individual customers for their personal storage needs." Judge Durkin held that the 72 units were permitted under the Bylaws as (a) a "retail rental" facility and (b) a "shop" or "store." PC at 9-18.

Thirty-seven of the original Appellants filed their notice of appeal to this Court on August 6, 2010. An additional five original Appellants joined in the appeal by amended notice filed on August 9, 2010.

STANDARD OF REVIEW

The Supreme Court reviews Environmental Court's rulings on questions of law *de novo*. *In re Village Associates Act 250 Permit*, 2010 VT 42A, ¶7, ___ Vt. ___, 998 A.2d. 712.

The Supreme Court will uphold the Environmental Court's interpretation of a zoning regulation if it is rationally derived from a correct interpretation of the law and not clearly erroneous, arbitrary, or capricious. *In re Korbet*, 2005 VT 7, ¶11, 178 Vt. 459, 868 A.2d 720; *In re Bennington School, Inc.*, 2004 VT 6, ¶11, 176 Vt. 584, 845 A.2d 332; *Simendinger v. City of Barre*, 171 Vt. 648, 650, 770 A.2d 888, 892 (2001).

The Supreme Court examines the court's findings of fact for clear error. An appellant must show that there is no credible evidence to support the finding. *Mullen v. Phelps*, 162 Vt. 250, 260, 647 A.2d 714, 720 (1994).

ARGUMENT

The Environmental Court clearly erred in holding that a 72-unit, self-storage facility qualifies as a permitted use in the Dorset Village Commercial zone.

I. The Court's definition of "retail rental" ignored the plain language and stated purposes of the Bylaws, and would create irrational results.

The purpose of the VC zone is stated in Section 6.1 of the Bylaws:

> The purpose of Village Commercial Districts is to provide lands for a combination of residential and compatible village-scale commercial uses, which provide convenience services and incidental shopping for residents and visitors of the village areas while protecting scenic and environmental qualities of those lands and retaining the residential character of the villages. Residential characteristics in building scale, daily traffic loads, and landscaping should be maintained in all commercial developments. Village scale is defined in the dimensional requirements [of] Section 6.2.7 of this Bylaw. PC at 19.

Bylaws Sec. 6.3.4 defines the specific uses permitted in the VC zone, and Sec. 6.3.5 defines the specific uses conditionally permitted in that zone. Neither of these sections specifically authorizes self-storage facilities.

The applicant nonetheless argued that the proposed self-storage complex should be considered a permitted use under Sec. 6.3.4(b)(3). In pertinent part, this section authorizes the following uses:

> Retail sales/rentals. All sales, storage and display of merchandise shall occur within an enclosed structure, except for temporary display of merchandise outdoors, on-site during the operating hours of the business, or from 8:00 a.m. to 6:00 p.m., whichever is later, provided that all such merchandise is stored in a building or screened storage area at the close of business each day. Agricultural products are exempted from the outdoor storage restrictions. No sale of automotive or diesel fuel is permitted. PC at 21.

Appendix A of the Bylaws defines "retail" as "refer[ring] to a shop or store for the sale of goods, commodities, products or services directly to the consumer as opposed to wholesale." PC at 22.

The Environmental Court held that Sec. 6.3.4(b)(3) of the Bylaws authorized "retail rental" uses in the VC zone, and that this term should be understood to refer to any rental business (a) serving consumers and (b) involving "small quantity" rentals.[2] While the Court did not define "consumers" it found that the proposed facility qualified as a "retail rental" because it would be used by "individual customers for their personal storage needs." PC at 15-16.

The Court acknowledged that its definition of "retail rental" was not expressly set forth in the language of the Bylaws. Indeed, the Court acknowledged that its definition was inconsistent with the express language of the Bylaws' definition of "retail" in Appendix A. This definition refers to sales in shops and stores. The Court further asserted that the dictionary "does nothing to illuminate the meaning of 'retail rentals.'" PC at 13-15.

Nonetheless, the Court proceeded to create its own definition of "retail rental" based on the "belie[f] that the drafters' true intent" could be derived from definitions of "retail" that differed from the definition in the Bylaws. The Court wrote that its own definition of "retail rental" was closer to the "spirit" of what the drafters of the Bylaws must have intended than the express definition that they in fact approved. PC at 15.

The Court also found that the 72 self-storage bays – each with its own garage-style door and distributed among three separate metal buildings – constituted a "shop" or "store." (It is unclear whether the Court found that proposed project would be a facility containing 72 different stores, or a single store providing 72 different units.) PC at 15.

In its path to this interpretation of "retail rental" and "shops" and "stores," the Court dutifully recited various well-established principles of statutory construction. PC at 11-12.

[2] The Court rejected the applicant's argument that all rentals of whatever nature should be permitted in the VC District. PC at 12.

However, the Court's clearly erroneous and arbitrary conclusions clash with the very principles on which it purports to rely.

There is a straightforward reading of Sec. 6.3.4(b)(3) that does *not* ignore the Bylaws' plain language and stated purposes in search of their illusive "spirit." A majority of the voting participants of the Dorset ZBA adopted this reading, and their interpretation is fully consistent with the well-established principles of statutory interpretation:

> "Section 6.3.4(b)(3) clearly refers to the sale and rental of merchandise. Within this context, the permitted use contemplated by the Dorset Zoning Bylaws clearly refers to the retail sale or rental of merchandise and not the rental of space." PC at 7.

Section 6.3.4(b)(3) expressly regulates the sale, storage and display of "merchandise" and sets standards that limit display of merchandise in a manner calculated to enhance, not detract from, a village setting. The ZBA's reading of the Bylaws limits the permitted rental use in the VC District to shops or stores that rent merchandise to consumers.

This reading not only stays close to the text of the Bylaws, but is also fully consistent with the VC zone's purpose of allowing only uses compatible with the village character and the zone's existing residential scale. The "paramount goal" in construing legislation is to discern and implement the intent of the drafters. *Miller v. Miller,* 2005 VT 89, ¶14, 178 Vt. 273, 882 A.2d 1196.

By construing "shop" and "store" to refer to any type of storage facility as long as consumers would rent it, the Court arbitrarily substituted a strained definition of plain English words that is inconsistent with the purposes of the Bylaws. Seventy-two storage units in three buildings more resemble the character of a strip mall than an historic village. The long rows of

adjoining garage-style doors would hardly be consistent with the "residential character of the village." Bylaws, Section 6.1.

A Court's interpretation of zoning bylaws is generally bound by the plain meaning of the words in the ordinance. *In re Pierce Subdivision Application*, 2008 VT 100, ¶ 8, 184 Vt. 365, 965 A.2d 468 (upholding interpretation of bylaws' plain meaning and rejecting a more complex interpretation offered by opponents). *See also* In *In re Korbet*, 2005 VT 7, 178 Vt. 459, 868 A.2d 720 (reversing Environmental Court and holding that plain language in the bylaw is controlling.)

"Where the meaning is plain, courts have the duty to enforce the [zoning] enactment according to its obvious terms and there is no need for construction. A zoning measure will be construed to give its words their ordinary meaning and significance." *Kalakowski v. John A. Russell, Corp.*, 137 Vt. 219, 223, 401 A.2d 906, 909 (1979)(citations omitted.)

In *Kalakowski*, the zoning administrator issued a permit for a warehouse in a commercial zone in which retail sales and retail stores were permitted uses. The proposed warehouse would have involved some on-site retail sales. The trial court found that retail sales from the warehouse would only be "incidental" and held that the warehouse was not a permitted use in the zone. This Court affirmed, also relying on the plain language of the zoning bylaws. The storage warehouse did not qualify as a retail sale facility or a store.

Has even one person driving by a self-storage facility in Vermont ever thought of it as a collection of scores of stores or shops? This is not a plain and simple use of the English language. The 6,000 square feet of storage units do not in the least resemble a collection of village-scale stores or shops. Yet the Environmental Court simply noted that "there is no suggestion in the record" that self-storage units are *not* stores or shops. PC at 15. In effect, the

Court found Appellants must prove as a matter of fact that a highly unusual use of an English noun should *not* apply to a particular project.

The Environmental Court is not free to stretch the English language based on the alleged absence of facts in the record. In *Simendinger v. City of Barre*, 171 Vt. 648, 770 A.2d 888 (2001), this Court relied on the plain meaning of the English language in finding that the Environmental Court erred in interpreting the city's zoning bylaws to allow a gasoline station in a planned residential district.

The Environmental Court apparently also concluded that 72 separate rental units would satisfy its invented standard of a "small quantity" of rentals. However, there is no finding or discussion in the Court's opinion as to why 72 separate units would satisfy this standard. Indeed, the Court's opinion abandoned its own standard of allowing only a "small quantity" when, at page 8 of the decision, the Court concluded without qualification that "retail rentals" are any activities that involve renting directly to a customer for personal needs. PC at 16.

Courts must interpret zoning bylaws to avoid a construction that would lead to absurd or unintended results. *In re Ambassador Ins. Co., Inc.*, 2008 VT 105, ¶ 18, 184 Vt. 408, 965 A.2d 486 (2008)(reversing trial court in interpretation of statute governing priorities in liquidation proceedings.)

The Court's contrived definition of "retail rental" as any rental to a customer for personal needs would license irrational applications of the Bylaws that are clearly inconsistent with the stated purposes of the zoning district. If an owner were selling merchandise, strict standards in the Bylaws would assure that the residential qualities and village scale of the neighborhood are respected. If the transaction involved rentals of space, there would be no standards at all as long as the end user is a consumer.

Under the Court's interpretation, a storage yard clogged all winter with shrink-wrapped motorboats stored in spaces rented to their owners might be permitted, but it would be unlawful to leave lawn ornaments offered for sale out of doors for even one night. Other uses involving rentals to individual customers that might be permitted under the Court's interpretation would include pet boarding facilities or rentals of outdoor storage space for equipment or vehicles owned by residents or visitors.

In construing the Dorset Bylaws, the Court must consider "the entire enactment, its reason, purpose and consequences." *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129 ¶7, 185 Vt. 129, 969 A.2d 54 (reversing trial court's construction of statute relating to tax exemptions.) The purpose of the Commercial Industrial zones in Dorset is to allow a mix of uses consistent with more light industrial and commercial uses. Bylaws § 6.1. As the Environmental Court recognized in this case, the Dorset Commercial Industrial Two (CI-2) zone specifically permits "sales/rentals of vehicles, equipment and machinery." Bylaws § 6.2.3.5. The Court specifically found that allowing those same uses in the VC District would *"undermine the Town's efforts to limit such rental activities to the [CI-2]District[]"* (emphasis supplied). PC at 13.

Yet the Court proceeded to fashion a definition of permitted uses in the VC zone that would allow rental of vehicles, equipment and machinery in the VC zone provided only that the end users are individuals leasing the goods for their own personal use. This is precisely the result that the Court acknowledged in its prior analysis would "undermine" the purpose of the VC District.

The three metal, rectangular storage buildings with 72 garage-style doors are not compatible with the character and scale of existing residential and commercial land use in the

VC zone. The Route 30 corridor in the VC zones, with extremely limited exceptions due to pre-existing conditions, is characterized by a mix of residences and small-scale commercial uses consistent with the intent and regulations of the Dorset zoning bylaw for that district. PC at 43.

In sum, the Environmental Court erred by seeking to discover the "spirit" and "true intent" of the Bylaws rather than simply harmonizing express provisions in light of the stated purpose of the zoning district. By doing so, it arbitrarily substituted its own beliefs about what the drafters may have intended for what the drafters wrote.

Courts must *not* assume that the drafters of bylaws or statutes are "grammar schools," and "it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy." *State v. Lynch*, 137 Vt. 607, 613, 409 A.2d 1001, 1005 (1979)(rejecting interpretation of statute based on grammatical dissection). Some play in the grammatical joints can be expected in any zoning bylaws, and Dorset's are no exception.

The Environmental Court has acknowledged expertise in interpreting zoning bylaws, and this Court gives deference to its interpretations. However, that deference does not extend to clearly erroneous or arbitrary constructions. *Simendinger v. City of Barre*, *supra* (reversing Environmental Court's interpretation of zoning bylaw).

In this case the Court engaged in an extended technical analysis that ended with the substitution of its own beliefs about the drafters' supposed intent for the plain language that the drafters adopted. In doing so, the Court created a definition that undermines the purpose of the VC District and produces irrational results. This was clear error.

II. Even if the Court's definition of "retail rental" were upheld, it was clear error to find that the proposed project satisfies that definition.

The record fails to support the Court's application of its own contrived definition of "retail rental" to the project at issue. The Court found that the facility "will be rented to individual customers for their personal storage needs." PC at 16.

However, the record is undisputed that the facility would not be limited to use by individuals for their personal storage needs. The applicant's own affidavit states repeatedly that the facility would be used by businesses to store equipment, supplies and inventory. PC at 24-25.

Businesses renting these units to store inventory, equipment and supplies could readily use the facility as their garage, warehouse or wholesale distribution center. The applicant states, for example, that the owner of an invisible fence company would keep his inventory in the facility for use when he is doing work in Dorset. The applicant also states that the owner of a plumbing business would use two bays to store inventory and parts, as would the owner of an awning installation business. This is a commercial warehouse use, plain and simple. PC at 24-25.

Such use would be wholly inconsistent with the express purposes of the VC zone and with the permitted uses enumerated in the Bylaws. It is also wholly inconsistent with the Environmental Court's definition of "retail rental" as a rental to customers for their own personal needs. Even if this Court were to sustain the Environmental Court's definition of "retail rental," it was still clear error for the Environmental Court to hold that this facility would in fact meet that definition.

Conclusion

The decision of the Environmental Court should be reversed, and the Court should hold that the proposed self-storage facility is not a permitted use in Dorset's VC zone.

Respectfully submitted,

Dated: September 15, 2010

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APPENDIX

Dorset Zoning Bylaws Section 6.1

The purpose of Village Commercial Districts is to provide lands for a combination of residential and compatible village-scale commercial uses, which provide convenience services and incidental shopping for residents and visitors of the village areas while protecting scenic and environmental qualities of those lands and retaining the residential character of the villages. Residential characteristics in building scale, daily traffic loads, and landscaping should be maintained in all commercial developments. Village scale is defined in the dimensional requirements [of] Section 6.2.7 of this Bylaw.

Dorset Bylaws Section 6.2.3.5

[Permitted Uses in the Commercial-Industrial Two (CI-2) District]

Sales/Rentals of vehicles, equipment and machinery. Outdoor storage of merchandise permitted.

Dorset Zoning Bylaws Section 6.3.4(b)(3)

[Permitted Uses in the Village Commercial Districts]

Retail sales/rentals. All sales, storage and display of merchandise shall occur within an enclosed structure, except for temporary display of merchandise outdoors, on-site during the operating hours of the business, or from 8:00 a.m. to 6:00 p.m., whichever is later, provided that all such merchandise is stored in a building or screened storage area at the close of business each day. Agricultural products are exempted from the outdoor storage restrictions. No sale of automotive or diesel fuel is permitted.

Dorset Zoning Bylaws Appendix A

Retail: Refers to a shop or store for the sale of goods, commodities, products or services directly to the consumer, as opposed to wholesale.

IN THE SUPREME COURT
FOR THE
STATE OF VERMONT
Supreme Court Docket No. 2010-307

In re: Tyler Self Storage Units Permits	]	**Appealed from**
	]	**Vermont Environmental Court**
	]	**Docket No. 189-9-09 Vtec**

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REPLY BRIEF OF THE APPELLANTS

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INTRODUCTION

Appellee argues that the Bylaws are "indisputably flawed" and unconstitutionally vague, while also claiming that the Bylaws create an orderly scheme into which the proposed project "unambiguously" fits. *See* Appellee's Brief at 2, 8-9 and 24-26. Appellee argues both that the Environmental Court persuasively interpreted the Bylaws and that the Court erred by reading the Bylaws too narrowly. *Id., passim*. Finally, Appellee charges the Appellants with substituting their own wishes for the actual text of the Bylaws, and for raising new claims on appeal. *Id.* at 1 & 26-27.

These scattershot attacks on the Bylaws and the Appellants' arguments misconstrue both.

The core of the Appellants' argument is that there is a straightforward reading of the Bylaws that is consistent with their text and purposes, and that the Environmental Court clearly erred when it engaged in a search for the Bylaws "spirit" and "true intent." The straight-forward reading of the Bylaws is the one approved by the majority of the voting participants of the Dorset Zoning Board of Adjustment in this case. *See* Appellants' Brief at 7. Appellants do not argue that the ZBA's reasoning is *binding*, as suggested by Appellee. Appellee's Brief at 18. Rather, Appellants argue that the ZBA's reasoning is *persuasive* based on the purposes and text of the Bylaws.

In that context, this Reply Brief specifically responds to a number of arguments raised by Appellee.

The record does not support the Court's decision.

Appellee argues that "Appellants contend – for the first time in this litigation – that because certain of the tenants leasing space within the proposed self-storage facilities

may turn out to be small business owners storing excess inventory or equipment in the storage bays, the Project will constitute a "commercial warehouse." Appellee's Brief at 26.

That is incorrect. Appellants argue that the record does not support the Environmental Court's decision. Appellants' Brief at 12. The Environmental Court contrived a definition of "retail rental" and then found that the self-storage buildings satisfied that definition because units would be rented to "individual customers for their personal storage needs." PC at 16. The record not only fails to support that finding; the record expressly contradicts it. PC at 24-25; *see* Appellants' Brief at 12. That finding was crucial to the Court's decision because the definition of "retail rental" confected by the Court would not be satisfied by a facility that functioned as a warehouse for business equipment and inventory, or as a regional distribution center.

Appellee does not attempt to dispute the absence in the record of any support for the Court's finding. Rather Appellee attempts to trivialize his own affidavit as "speculative" and to suggest that warehousing of business inventory and equipment would be consistent with the Court's definition of "retail rental" because such use would only be "incidental." Appellee's Brief at 28. Yet all the prospective users of the facility that Mr. Tyler enumerated in his affidavit at ¶¶ 15-20 are businesses planning to warehouse equipment or inventory on site. Several of these would use the facility as a regional distribution center for the inventory. PC at 24-25. There is no basis in the record for the assertion that such uses would be merely incidental, nor did the Court so find. The record is indisputable that such uses would be permitted and are indeed anticipated by the Appellee.

The Appellee's alternative arguments for defining permitted uses in the VC zone would broadly expand the scope of permitted uses in a manner inconsistent with the zone's stated purposes and well-established principles of statutory interpretation.

Appellee variously argues that rentals of all types, or any rental use that "provides for a public demand," or any rental use that may meet certain dimensional requirements, should be considered as permitted uses in the VC zone. Appellee's Brief at 11-12, 15.

These arguments all rely on using the most expansive of dictionary definitions for key words, and then seeking to pry wide the scope of permitted uses in accord with the broadest definition. This interpretive technique has its own limits.

This Court has repeatedly cautioned that statutes and bylaws should be interpreted according to the plain usage of words. If there are ambiguities, these should be resolved in accord with the purposes of the statute and bylaws, and so as to avoid irrational results. *See, e.g., Kapusta v. Department of Health/Risk Management*, 2009 VT 81, ¶8, 186 Vt. 276, 980 A.2d 236 ("we look to the statute's plain meaning when the language is clear and unambiguous. Where there is ambiguity, we look to the general context of the statutory language, the subject matter, and the effects and consequences of our interpretation"); *Trickett v. Ochs*, 2003 VT 91, ¶22, 176 Vt. 89, 838 A.2d 66 ("we must look to the language of the entire statute along with its purpose, effects and consequences.")

In addition, ordinances and statutes must be interpreted consistently with the Constitutions of Vermont and the United States. *In re Certain Juvenile*, 129 Vt. 185, 188, 274 A.2d 506, 509 (1970) (statutes should be given "a reasonable construction, consistent with constitutional requirements"); *Vermont Woolen Corp. v. Wackerman*, 122

Vt. 219, 223, 167 A.2d 533, 536 (1961)(the court will choose "a constitutional construction, if reasonable, over an unconstitutional one.")

The Environmental Court appropriately relied on the interpretive principle of *ejusdem generis* in expressly rejecting the Appellee's argument that all rental uses should be permitted in the VC zone. PC at 12-13. The Appellee's argument rested on an extended analysis of the meaning and weight to be given to a virgule ("/"). Supplemental Printed Case ("SPC") at 6-7. If accepted, the Appellee's argument would limit *sales* in the VC District to retail uses, but allow retail, wholesale and industrial *rental* uses. This makes no sense in terms of the zone's purpose of providing "convenience services and incidental shopping for residents and visitors of the village areas while protecting scenic and environmental qualities of those lands and retaining the residential character of the villages."

The Appellee's argument impermissibly distinguishes between permitted and prohibited land uses based solely on whether the use involves rental or sale contracts. Zoning regulates land use, not the form of contracts. *In re Lowe*, 164 Vt. 167, 666 A.2d 1178 (1995)(no basis for zoning jurisdiction over conversion of residential units to condominium where the only change is in the form of ownership.)

The Appellee also argues that the rental of space for storage purposes should be considered a "service rental" because it is "useful to others." Appellee's Brief at 11-12. Under this interpretation, any rental of real estate for virtually *any* use would be permitted as a service. A rented warehouse would be a service. A rented transshipment center would be permitted as a service. A rented bulk fuel storage facility would be a service. These uses are ones that are expressly permitted by the Bylaws in other zones,

but are not listed among the permitted uses for the VC zone.[1] So Appellee's aggressive mode of interpretation would permit uses in the VC zone by implication even though these uses are expressly assigned by the Bylaws to other zones.

Dorset's Bylaws do not exclude from the town intensive uses that are less compatible with residential village neighborhoods. Rather these uses are permitted in the Commercial-Industrial (CI) zones. The Appellee's heavy weighting of particular words would have the effect of collapsing the Bylaws' express use designations, and would allow a very broad range of commercial and industrial uses in the VC zone.

Appellants argued that the Bylaws should be interpreted consistently with the stated purpose of limiting uses in the VC zones to those compatible with its village residential characteristics. Appellants' Brief at 10-11. Appellee responded that the self-storage facility would meet certain setback and dimensional requirements, and therefore must be deemed consistent with the purposes of the Village Commercial zone. Appellant's Brief at 15.

The stated purpose of the Village Commercial zone is:

> [T]o provide lands for a combination of residential and compatible village-scale commercial uses, which provide convenience services and incidental shopping for residents and visitors of the village areas while protecting scenic and environmental qualities of those lands and retaining the residential character of the villages. Residential characteristics in building scale, daily traffic loads, and landscaping should be maintained in all commercial developments. PC at 19.

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[1] Warehouses and wholesale distribution centers are permitted in the CI-1 zone under §6.2.2(b)(7) & (9); bulk fuel storage is permitted in the CI-2 zone under § 6.2.3(3); transshipment centers are permitted in the CI zone under § 6.2.2(b)(8). *See* Appendix A for full text of these sections of the Bylaws.

The purpose statement is comprehensive in scope, and should not be applied selectively. There are many uses for which buildings in the zone might meet the dimensional requirements but not be compatible with protecting scenic and environmental qualities or retaining the residential character of the village. These might include bulk fuel storage facilities, sports clubs, commercial kennels, contracting businesses and other commercial ventures that are expressly designated by the Bylaws for other zones than the VC.[2]

Appellants argued that the Court's definition of "retail rental" would create irrational results and unintended consequences. For example, the Court's interpretation of "retail rental" would allow rental of space for continuous open-air, motorboat storage, but require that lawn ornament merchandise be brought inside each night. Appellants' Brief at 9-10. Appellee responded that site plan review could mitigate irrational impacts by allowing the Planning Commission to impose conditions applicable to internal site circulation, off-site glare, drainage landscaping and other impacts. Appellee's Brief at 22.

Of course, site plan review serves a useful zoning function, and, yes, it can mitigate otherwise undue, adverse impacts of development. However, site plan review does not define permitted uses in a zone, nor does case-by-case review allow imposition of uniform standards throughout a zone. Appellee in effect concedes that his interpretation and that of the Court would allow seasonal storage of the shrink-wrapped motorboats in a yard but ban overnight, outside storage of merchandise offered for sale on the same premises. The Appellee's response is that the Planning Commission could

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[2] Bulk fuel storage is permitted in the CI-2 zone under § 6.2.3(3); commercial kennels are permitted in the CI-1 zone under § 6.2.2(b)(19); sports clubs are permitted in the CI-1 zone under § 6.2.2(b)(16); contracting businesses are permitted in the CI-1 zone § 6.2.2(b)(5).

try to deal with such illogical consequences during site plan review. Appellee's Brief at 22.

The Appellee's response raises fundamental questions about the application of regulatory standards, and indeed touches on the due-process issues raised by the Appellee in another context. *See* Appellee's Brief at 9-10.

Appellee asserts that illogic in the application of express standards in the Bylaws can be addressed on a case-by-case basis in regulatory proceedings through imposition of permit conditions under various impact criteria. It is one matter for a town's zoning ordinance to state expressly that there shall be no outside overnight storage in a certain zoning district. The citizens can change the restriction by amending the ordinance if they do not like it. Neighbors, property owners and developers are put on clear notice of the limitation. Quite another matter is the creation of such standards by selective imposition of permit conditions.

The Legislature granted to municipalities the power to adopt zoning bylaws provided these are "uniform for each class of each use or structure within each district..." 24 V.S.A. § 4411(b). The Appellee argues that this uniformity can be created in the process of administration rather than in the defining language of the ordinance. In effect, the Appellee is advising this Court to disregard illogic consequences when interpreting the Bylaws and to let the Planning Commission sort this out on a case-by-case basis in site plan review.

This argument is wholly inconsistent with the principles that ordinances must be interpreted in accordance with their purposes and authorizing legislation, and to avoid absurd results. *In re Ambassador Insurance Company, Inc.*, 2008 VT 105, ¶ 18, 184

Vt.408, 965 A.2d 486 ("We favor interpretations of statutes that further fair, rational consequences, and we presume that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences"); *Delta Psi Fraternity v. City of Burlington,* 2008 VT 129, ¶7, 185 Vt. 129, 969 A.2d 54 ("we... consider[] the whole statute, the subject matter, its effects and consequences..."); *Miller v. Miller,* 2005 VT 89, ¶14, 178 Vt. 273, 882 A.2d 1196 ("We... [look] to the reason and spirit of the law and its consequences and effects.")

This argument is also inconsistent with the constitutional principle that regulatory enactments must provide "sufficient conditions and safeguards" to guide property owners. *In re Appeal of JAM Golf, LLC*, 2008 VT 110, ¶13, 185 Vt. 201, 969 A.2d 47 (zoning ordinance violates due process by failing to establish sufficient standards.) The standards for land use regulation must be set forth in the text of the Bylaws, not created *ad hoc* after an application is filed. Express standards undergird the reliance interests of other property owners, such as the Appellants here, as well as developers.

Ironically, the Appellee has argued that the Bylaws should be struck down as unconstitutional because the Bylaws state that any ambiguities in usage should be resolved by consulting a dictionary, but then fail to specify which dictionary. Appellee's Brief at 9. This same argument could be made about the principle established by this Court that statutes and ordinances must be interpreted according to the plain meaning of the language. *See e.g., In re Ambassador Insurance Company, Inc.*, 2008 VT 105 at ¶18 ("[we]... will presume the Legislature intended the plain, ordinary meaning of the statute.") What does "plain, ordinary meaning" mean? Consult a dictionary. Which dictionary? It is not specified. The principle is therefore unconstitutional under the

Appellee's reasoning. There is no precedent for such a claim, nor could such precedent be contained if ever established.

Finally, Appellee asserted several times in his Brief that the Appellants are asking the Court to impose a use limitation that they merely wish was contained in the Bylaws. *See, e.g.,* Appellee's Brief at 1. That is not correct. Appellants believe that there is a clear interpretation that is consistent with the text and purposes of the Bylaws, and which does not produce irrational results. This is the interpretation adopted by the Dorset Zoning Board of Adjustment:

> The [Bylaws] use[] the words shop and store in combination in the definition of retail. When used in combination in the definition of retail a clear reading of the section 6.3.4(b)(3) is that the intended type of retail uses permitted in the Village Commercial District are for business establishments that sell or rent specified goods or merchandise. This follows as the rest of section 6.3.4(b)(3) pertains to limitations on how and when the specific goods or merchandise can be displayed as well as what types of merchandise cannot be sold." PC at 6-7.

In sum, while this appeal is focused on the language of one section of one town's zoning bylaws, the briefs of the parties and the Environmental Court's decision raise broader questions about principles of regulatory interpretation and the degree of deference due to the interpretations of the Environmental Court.

Appellants acknowledge that close grammatical analysis of Dorset's Bylaws will yield ambiguities or inconsistencies. That is not uncommon with regulations and statutes. They are not always internally consistent or grammatically elegant. *State v. Lynch*, 137 Vt. 607, 613, 409 A.2d 1001, 1005 (1979)(rejecting interpretation of statute based on close grammatical analysis.) However, the Zoning Board of Adjustment's reading provides a simple and clear meaning, closely titled to the grammar and text, and

consistent with the stated purposes of the VC zone.

The question is whether this Court is prepared to defer to an alternative interpretation by the Environmental Court of these Bylaws that was admittedly not "illuminated" by any dictionary, and which was based on a quest to determine the drafters' "true intent." PC at 13-15. The Appellee meanwhile asserts a variety of alternative grounds to define permitted uses in the VC zone so broadly that they would encompass a set of uses that are explicitly designated by the Bylaws for other zones.

These approaches create illogical results by allowing uses that are not expressly permitted to escape the restrictions applicable to the expressly permitted uses, and by distinguishing permitted uses from unpermitted uses based solely on the form of a transaction's contract.

This Court should be wary of deferring to an interpretation by the Environmental Court that substitutes the Court's own view of the drafters' intentions for the words that they used; that ignores the stated purposes of the Bylaws; and that would create illogical results, some of which would require unconstitutional means to mitigate them.

Conclusion

The decision of the Environmental Court should be reversed because it is not supported by the record, and is clearly in error.

Respectfully submitted,

Dated: October 21, 2010

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APPENDIX

Dorset Bylaws Section 6.2.2

6.2.2 Permitted Uses in the Commercial Industrial One (CI 1) District

a. The following are permitted uses in the CI 1 District and do not require Site Development Plan review, unless otherwise provided.

1. Public and semi public uses enumerated in Section 3.7. A Site Development Plan is required.

2. Single family and two family dwellings and accessory structures.

3.Conversion of a single family dwelling to a two family dwelling.

4. Conversion of an accessory building, in whole or in part, associated with an existing single family or two-family dwelling, to be used for dwelling purposes for up to two families, either for rent or for non paying occupancy.

5. Customary home occupations subject to the requirements of Appendix A. If the Zoning Administrator is not sure all of the requirements will be met, or if it is not clear that the occupation meets the definition in Appendix A, the Zoning Administrator shall forward the complete application to the Planning Commission for review under Section 3.8 of this Bylaw.

6. Farming, including but not limited to dairying, orchards, truck gardening,keeping of poultry, and other agricultural and silvicultural uses as defined in 24 V.S.A., Ss 4413(d). A permit is not required.

7. A farm stand, subject to the requirements in Appendix A.

8. A private recreational, hunting or fishing camp limited to erection of structures for temporary use only. Such structures should not be suitable for a dwelling, but sufficient to be used occasionally or seasonally for temporary shelter in connection with a recreational activity.

9. Residential Care or Group Home (see 3.7.7.)

10. Family Childcare Home (see 3.7.8)

b. The following are permitted uses in the CI 1 District and require Site Development Plan review.

1. Manufacture, assembly, compounding, and processing of goods to be conducted within a building.

2. Retail sales of goods/products as incidental and accessory to the principal use, up to 25% of the total floor area.

3. Research facilities.

4. Professional and business offices.

5. Contracting businesses such as plumber, electrician, carpenter, auto and truck repair, and similar uses.

6. Printing and publishing establishments.

7. Wholesale distributors.

8. Trans shipment centers.

9. Warehousing for mail order distribution centers.

10. Vocational schools which are not State certified.

11. A State registered or licensed residential care home or group home serving nine (9) or more persons who have a handicap or disability.

12. A State registered or licensed family child care home serving in excess of six full-time and four part time children (not including children of the owner/operator).

13. A library, museum, or similar philanthropic use not operated by the State or municipality.

14. A cemetery owned by a church or a cemetery association located in the Town of Dorset.

15. A park, playground, or recreation building or center not operated by the State or municipality.

16. A health club/sports club.

17. A public or private sports facility excluding stadiums.

18. Multi-family dwellings and accessory structures.

19. A commercial kennel, veterinary hospital or riding stable.

20. A firewood/cordwood processing operation that produces twenty (20) or more (4' x 4' x 8') cords per year.

21. The removal of sand, gravel, topsoil or quarried stone for sale when incidental to, or connected with the construction of a building on the same premises.

22. The operation of rock, sand and gravel pits, and topsoil removal in accordance with Section 10. 7 and other applicable sections of this Bylaw.

23. Extractive industries for the removal of minerals, gas and oil, provided that all applicable State and federal laws are complied with and would not cause pollution on the property of any adjacent landowner by way of excessive noise, dust, or traffic or of any other nature which would tend to disturb residents on adjoining property or anywhere in the Town.

24.Temporary use of open land for public events.

25. Restaurants, provided that all food and beverages are served to customers seated at tables or counters, inside or outside the building, but this shall not prevent a catering operation where food is sold and taken out for home consumption. Drive up windows are not permitted.

26. A sawmill.

Dorset Bylaws Section 6.2.3

6.2.3 Permitted Uses in the Commercial Industrial Two (CI 2) District

1. All those uses permitted in the CI 1 District, as set out in Section 6.2.2.

2. Contracting businesses such as plumber, electrician, carpenter, auto and truck repair, and similar uses. Outside storage of materials and supplies is permitted.

3. Bulk fuel storage inside or outside a building.

4. Lumberyards, outside storage of merchandise permitted.

5. Sales/rentals of vehicles, equipment and machinery. Outside storage of merchandise permitted.

Dorset Bylaws Section 6.2.4

6.2.4 Conditional Uses Permitted in the Commercial-Industrial One (CI 1) and Commercial-Industrial Two (CI 2) Districts

1. Conversion of a single family or two family dwelling to a multi-family dwelling.

2. Conversion of an accessory building, in whole or in part, associated with an existing single family or two family dwelling, to be used for dwelling purposes for more than two families either for rent or for non paying occupancy.

3. Tourist Home (Bed and Breakfast) as defined under Public Lodging in Appendix A.

4. Rooming House (Boarding House) as defined under Public Lodging in Appendix A.

5. A mixed use, such that a residential and other permitted or conditional use is combined.

Dorset Bylaws Section 6.3.4

6.3.4 Permitted Uses in the Village Commercial (VC) Districts

a. The following are permitted uses in the VC Districts and do not require Site Development Plan review, unless otherwise provided.

1. Public and semi-public uses as per Section 3.7. A Site Development Plan is required.

2. Single family and two-family dwellings and accessory structures.

3. Conversion of a single family dwelling to a two-family dwelling.

4. Conversion of an accessory building, in whole or in part, associated with an existing single family or two-family dwelling, to be used for dwelling purposes for up to two families, either for rent or for non paying occupancy.

5. Customary home occupations subject to the requirements of Appendix A. If the Zoning Administrator is not sure all of the requirements will be met, or if it is not clear that the occupation meets the definition in Appendix A, the Zoning Administrator shall forward the complete application to the Planning Commission for review under Section 3.8 of this Bylaw.

6. Residential Care or Group Home (see 3.7.7)

7. Family Childcare Home (see 3.7.8)

b. The following are permitted uses in the VC Districts and require Site Development Plan review.

1. Tourist Home (Bed and Breakfast) as defined under Public Lodging in Appendix A.

2. Rooming House (Boarding House) as defined under Public Lodging in Appendix A.

3. Retail sales/rentals. All sales, storage and display of merchandise shall occur within an enclosed structure, except for temporary display of merchandise outdoors, on-site during the operating hours of the business, or from 8:00 a.m. to 6:00 p.m., whichever is later, provided that all such merchandise is stored in a building or screened storage area at the close of business each day. Agricultural products are exempted from the outdoor storage restrictions. No sale of automotive or diesel fuel is permitted.

4. Business and professional offices.

5. Personal service establishments such as barber shops, hairdressers, shoe repair, dry cleaner, laundry, copy/type shop, caterer, and other like uses as approved by the Planning Commission. Drive-up windows are not permitted.

6. Inns

7. Banks and savings and loans institutions. Drive-up windows are not permitted.

8. Restaurants, provided that all food and beverages are served to customers seated at tables or counters, inside or outside the building, but this shall not prevent a catering operation where food is sold and taken out for home consumption. Drive-up windows are not permitted.

9. Contractors such as repair of appliances, bicycles, and lawnmowers, and contractor businesses such as plumbing and electrical. All materials, equipment, storage, sales and items being repaired shall be located inside an enclosed building, or, with the approval of the Planning Commission during Site Plan Review, a covered storage area closed on 3 sides. Outdoor display may occur as for retail in 6.2.4.b.3.

Dorset Bylaws Section 6.3.5

6.3.5 Conditional Uses Permitted in the Village Commercial (VC) Districts

1. A State registered or licensed family child care home serving in excess of six full-time and four part time children (not including children dependents of the owner/operator).

2. A State registered or licensed residential care home or group home serving nine (9) or more persons who have a handicap or disability.

3. An automobile maintenance/repair business limited to a maximum of two service bay doors not to exceed 10' x 10' each. Only employee vehicles, or registered vehicles scheduled for service or on which service has been completed, may be parked outside the building. No storage or sales of any vehicles, equipment or materials, nor parking of cars permanently disabled, is permitted outside the building. No sale of automotive or diesel fuel is permitted.

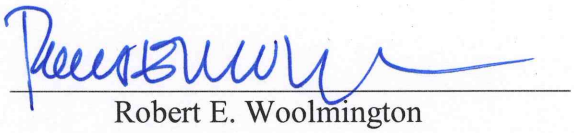
4. Recreational facilities, either open land, or within buildings.

5. Theaters.

6. A mixed use, such that a residential or other permitted use and conditional use are combined.

CERTIFICATE OF COMPLIANCE

Robert E. Woolmington, Counsel for the Appellants, hereby certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of Microsoft Word 2007, the text of this brief (excluding table of contents, table of authorities, signature block and certificate of compliance) contains 2,815 words.



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