

Rouleau v. Town of Cabot, No. 473-8-06 Wncv (Teachout, J., Apr. 23, 2007)

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**STATE OF VERMONT  
WASHINGTON COUNTY**

<b>MARLYN ROULEAU,</b>	)	
<b>Plaintiff,</b>	)	<b>Washington Superior Court</b>
	)	<b>Docket No. 473-8-06 Wncv</b>
<b>v.</b>	)	
	)	
<b>TOWN OF CABOT, et al.,</b>	)	
<b>Defendants.</b>	)	

**DECISION  
Defendant Town of Cabot’s Motion for Summary Judgment**

Plaintiff Marlyn Rouleau seeks Rule 75 review of the Town of Cabot Selectboard’s decision affirming the sewage officer’s denial of her petition to revoke her neighbors’, the Wells’, sewage permit pursuant to the Town’s sewage ordinance. The Town seeks summary judgment arguing that no relief is available under Rule 75 because, essentially, the Town’s treatment of Rouleau’s petition was within its discretion. Defendants Dale and Judith Wells support the Town’s motion. For the following reasons, the Town’s motion is granted.

The following facts are undisputed. The Wells purchased a camp on Joe’s Pond in 1996. In 1997, they applied for a zoning permit to demolish the camp and replace it with a new one with the same footprint. The Town’s zoning administrator and sewage officer, then and now, Carleton Domey, found that the site was served by a septic system consisting of a 1,000 gallon tank and 100 feet of leach lines installed in 1990. He understood that the new structure would have more bedrooms and bathrooms than the one it was to replace. The town did not have in its records a sewage permit for the installation of the 1990 septic system, but Domey believed that one nevertheless existed because his “predecessor’s records are not all in the custody of the town.” Affidavit of Carleton Domey, ¶ 5. Perceiving no problem with the septic system or other aspects of the project, Domey did not require a new sewage permit application and approved the zoning application. Those decisions were never appealed.

In 2006, Rouleau, an adjacent landowner, filed a petition with Domey to revoke the Wells’ sewage permit pursuant to the revocation process made available in the Town’s sewage ordinance. Though the record in this court does not include any such written petition, the basis for the petition presumably was that Domey should have required a new sewage permit prior to granting the Wells’ 1997 zoning application. There is no suggestion that the petition to Domey

included any evidence implying the current failure or risk of failure of the Wells' septic system. The record in this court also includes no such evidence. Rouleau's complaint has been that proper procedures were not followed at the time of the 1997 zoning application, not that there is evidence otherwise suggesting any safety concern. Domey denied the petition to revoke the Wells' sewage permit.

Rouleau appealed to the Town's Selectboard pursuant to section 4.8 of the ordinance. The Selectboard held a public hearing, and later issued a written decision denying the appeal. In its decision, the Selectboard essentially concluded that there was "no discrepancy between what the ordinance requires and the conduct of Mr. Domey." Selectboard Decision (dated July 26, 2006). Rouleau has sought review of the Selectboard's decision in this court under Rule 75.

The Vermont Supreme Court recently summarized the purpose of Rule 75 review as follows:

Our review [under Rule 75] is limited. As we have explained, the relief available Rule 75 represents "the modern equivalent of extraordinary relief by mandamus or certiorari." The purpose of mandamus is generally to require a public official or body to perform a simple ministerial duty imposed by law, although it may be available to enforce even discretionary duties "[w]here there appears, in some form, an arbitrary abuse of power vested by law in an administrative officer . . . which amounts to a virtual refusal to act or to perform a duty imposed by law." The purpose of certiorari is to review judicial or quasi-judicial action of a lower court or tribunal "in regard to substantial questions of law affecting the merits of the case." Under either writ, the standard of review is "necessarily narrow."

*Ahern v. Mackey*, 2007 VT 27, ¶ 8 (citations omitted). The only decision subject to Rule 75 review in this case is that of the Selectboard in affirming the sewage officer's denial of the petition to revoke.

Rouleau essentially argues that the ordinance required a new sewage permit at the time of reconstruction, and the ordinance requires revocation now for lack of that second permit. By failing to reverse the sewage officer's denial of the petition for revocation, argues Rouleau, the Selectboard refused to perform a duty imposed by law.

Rouleau's argument fails for two reasons. First, the Selectboard interpreted the ordinance to require a sewage permit prior to the reconstruction of the residence. Domey had determined that there was a sewage permit, and did not require a new permit. The Selectboard concluded that the sewage officer did not improperly determine "that no *new* septic permit was required." Selectboard Decision (emphasis added). That is, while the Selectboard concluded that a permit must be in place, it also concluded that reconstruction did not necessarily trigger a requirement that the Wells apply for a new permit. The Selectboard's interpretation of its own ordinance is entitled to deference and does not appear to be patently arbitrary. Rouleau has not made any specific showing to the contrary.

Second, the decision to revoke a sewage permit is discretionary, not mandatory. Section 4.6 specifically says that “A Disposal System Construction Permit, Minor Permit or a Certificate of Compliance *may* be revoked by the Sewage Officer for any of the following reasons . . . .” Sewage Ordinance § 4.6 (emphasis added). In this case, at the time of the reconstruction, the sewage officer found that a permit existed, the reconstruction did not draw into question compliance with the ordinance’s requirements, and no new permit was required. The zoning permit was issued, and the reconstruction occurred. Roughly ten years later, presented with no evidence that the system had failed or was at risk of failing, the sewage officer exercised his discretion to not revoke the Wells’ sewage permit. The Selectboard did not improperly conclude that these circumstances do not suggest an abuse of discretion.

### **Order**

For the foregoing reasons, the Town’s motion for summary judgment is *granted*. The effect is that all Defendants are entitled to judgment.

Dated at Montpelier, Vermont this 20<sup>th</sup> day of April 2007.

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Mary Miles Teachout  
Superior Court Judge