Fuller and Gibson v. Town of Milton, No. S1291-06 Cncv (Katz, J., Nov. 8, 2007)

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STATE OF VERMONT SUPERIOR COURT
Chittenden County, ss.: Docket No. S1291-06 CnCiv

NANCY F. FULLER and JILL GIBSON

v.

TOWN OF MILTON

ENTRY
Appellants' Motion in Limine

Appellants Fuller and Gibson challenge the Town of Milton's most recent appraisal of their property, which was based on a "highest and best use" of subdivision into seventeen lots. In a 1990 appraisal appeal of this same property, this court determined that the land's highest and best use was to continue its use as a shared camp or to subdivide into five or fewer lots, not nine lots as the Town then argued. Appellants' motion in limine contends that collateral estoppel bars the Town from re-litigating the highest and best use unless they can prove "a substantial change of conditions" has occurred. The Town argues that a motion in limine is not appropriate in a non-jury trial, let alone a statutory appeal, and that tax

appeals should proceed de novo. Further, it asserts that the Board of Civil Authority's decision implies that it perceived a sufficient change in conditions such that issue preclusion should not apply.

"Motion in limine" is the name traditionally given to a pretrial request that certain inadmissible evidence not be referred to or offered at trial. See Black's Law Dictionary 1038 (8th Ed. 1999). How a party names its motion, however, has no bearing on the merits of the request. This motion asks for the court to hold that a part of the 1993 ruling is binding in this case, and that is the question we will consider.

Although 32 V.S.A. § 4467 indicates that tax appeals proceed "de novo," the term implies only that the Superior Court is not bound by the Board of Civil Authority's assessment, not that the Superior Court may operate without regard to its own previous rulings which might have preclusive effect. Like any other Superior Court trial, it is subject to the law of preclusion. Thus we reject the Town's argument that issue preclusion may not apply in a de novo appeal. The plain meaning of § 4467 requires no such conclusion.

Collateral estoppel or issue preclusion is appropriate when (1) it is asserted against one who was a part in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits in the prior action; (4) there was a full and fair opportunity to litigate the issue, and (5) preclusion is fair. In re Armitage, 2006 VT 113, ¶ 4. Under this test, a highest and best use determination in a tax appeal will be preclusive in a subsequent appeal unless "a substantial change in conditions had occurred or other considerations materially affecting the [situation] have intervened." See id.; In re Jolley Associates, 2006 VT 132, ¶ 12. See also Brae Associates c/o Hertz Reality v. Park Ridge Borough, 17

N.J. Tax 187, 193-94 (1998).

The fact issue in the earlier trial was highest and best use in 1990. Now, the issue is highest and best use in 2006. If zoning, neighborhood development, market forces, tree cover, or shorefront physiognomy have changed, then the highest and best use may also have changed. But absent proof of such a threshold change, the Town is precluded from challenging the earlier adjudication of highest and best use. See Armitage, 2006 VT 113, ¶ 4. We reject the Town's argument that the Board of Civil Authority's decision necessarily means that there have been such changes. The preclusion which presumptively governs in court also governed the Town's determination. One could easily argue that the Board's assessment is so similar to their decision in the 1990 case ($1,245,500 based on nine lots, versus $1,460,150 based on seventeen lots) as to suggest conditions have not changed to any great extent.

Appellants' motion is GRANTED IN PART.

Done at Burlington, Vermont, ______________________, 20___.

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M. I. Katz, Judge